

APPENDIX 1

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF TEXAS
3 DALLAS DIVISION

4 MICHAEL CLOUD,

5 Plaintiff,

6 VS.

7 CASE NO. 3:20-cv-01277-S

8 THE BERT BELL/PETE ROZELLE
9 NFL PLAYER RETIREMENT PLAN,

10 Defendant.

11
12 TRANSCRIPT OF MOTION TO COMPEL
13 HEARD BEFORE THE HONORABLE KAREN GREN SCHOLER
14 UNITED STATES DISTRICT JUDGE

15 AUGUST 25, 2021

16 APPEARANCES:

17 FOR THE PLAINTIFF:

18 Mr. Christian Dennie
19 BARLOW GARSEK & SIMON, LLP
20 920 Foch
Fort Worth, Texas 76107
cdennie@bgsfirm.com

21 FOR THE DEFENDANT:

22 Mr. Edward J. Meehan
23 GROOM LAW GROUP
24 1701 Pennsylvania Avenue
N.W.
Washington, D.C. 20006
emeehan@groom.com

25

A P P E A R A N C E S
(Continued)

FOR THE DEFENDANT:

Mr. Nolan Knight
MUNSCH HARDT KOPF & HARR, PC
3800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201
nknight@munsch.com

Official Court Reporter:

Thu Bui, CSR, RMR, CRR
1100 Commerce Street, #1654
Dallas, Texas 75242
(214) 753-2354

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P R O C E E D I N G S

(Call to order of the court.)

THE COURT: This is Civil Action
Number 3:20-cv-01277-S, Cloud v. The Bert Bell/Pete Rozelle NFL
Player Retirement Plan.

Counsel, please state your appearance. Let's
start with the Plaintiff.

MR. DENNIE: Christian Dennie at Barlow Garsek & Simon,
and I'm accompanied by Holden Cammack, a law clerk in our firm.

THE COURT: Okay. On behalf of Defendant.

MR. MEEHAN: Good afternoon, Your Honor. Edward
Meehan, and with me is Nolan Knight.

THE COURT: Okay. And you're taking the lead today,
right?

MR. MEEHAN: Yes, Your Honor.

THE COURT: So why don't you pull the microphone close
to you.

So before the Court today is ECF Number 41,
Michael Cloud's motion to compel. The Court has the motion,
which is extensive. It's titled Plaintiff's Emergency Motion
to Compel Compliance with Court's Order and Production of
Documents and Records and Incorporated Brief in Support
Thereof. It's ECF Number 41. ECF -- Defendant's opposition
titled Defendant's Opposition to Plaintiff's Emergency Motion
to Compel Compliance with Court's Order and Production of

1 Documents and Records, this is filed as ECF Document Number 46.
2 And then the Plaintiff's reply titled Plaintiff's Reply in
3 Support of Emergency Motion to Compel Compliance with Court's
4 Order and Production of Documents and Records and Incorporated
5 Brief in Support Thereof. It's filed as
6 ECF Document Number 50. There are appendices and documents
7 attached and those have been reviewed by the Court as well.
8 All those are before the Court.

9 And so at this time it's your motion, Mr.
10 Dennie. Go ahead.

11 MR. DENNIE: Thank you, Your Honor. I appreciate your
12 time today. And I will admit to you from time to time when I
13 have a mic, my voice drops down.

14 THE COURT: Pull the mic really close to you.

15 MR. DENNIE: 'Cause I think I'm being too loud. So if
16 I get too quiet, just let me know. Okay?

17 THE COURT: Pull it close to you 'cause you're almost
18 too quiet.

19 MR. DENNIE: How about now?

20 THE COURT: That's better.

21 MR. DENNIE: If I could, I'll just give you a little
22 bit of background on factual issues and kind of where we are
23 and then launch into what we're here to discuss.

24 So Michael Cloud is a former NFL football
25 player. He is a graduate of Boston College. He was drafted in

1 the second round by the Kansas City Chiefs in 1999. He played
2 for three teams in the NFL between 1999 and 2005, three teams
3 being the Chiefs, the Patriots, and the Giants. Winning a
4 Super Bowl with the Patriots that was following the 2003
5 season, Super Bowl played in 2004.

6 What the real crux of this case and where it
7 starts is Mr. Cloud was playing running back for the New York
8 Giants on October 31st, 2004, in a game against the Minnesota
9 Vikings in Minnesota. He was running left on a hand-off, gains
10 about 11 yards in the fourth quarter, has a helmet-to-helmet
11 collision that knocks him backwards to the ground. He couldn't
12 get up, a teammate helped him to his feet and then walked him
13 back to the huddle, then he went down.

14 Now, part of the thing with this case is we
15 think in terms of what things are like now. Things were very
16 different in 2004. A helmet-to-helmet collision was not a
17 penalty. Now it's an ejection. A concussion that he received
18 has a five-step process to return to play now. Then, there was
19 no such process.

20 Mr. Cloud returned to football activities
21 48 hours after his concussion and sustained further injury to
22 the point to where in 2005 when he returned to play, he could
23 not remember basic running back plays he'd been running since
24 he was seven years old. Things like sweeps, dives, where to
25 line up. No clue. Quarterbacks had to whisper in his ear what

1 he needed to do.

2 After the 2005 season, that concluded Mr.
3 Cloud's play in the NFL. He never worked again. He attempted
4 to serve as a personal trainer. He had a couple of spot
5 personal training sessions here and there but could never
6 regain any type of employment. And that's not just from
7 concussions he received, but also from orthopedic injuries.

8 He had a number of major orthopedic injuries,
9 one of which, as you've probably seen in the pleading, a big,
10 large piece of muscle had to be removed from his shin in a
11 surgery due to an infection he received while playing with the
12 Patriots.

13 So that kind of brings us to where the facts
14 are of the case. What we get to is a process that has been
15 heavily disputed, fought about, congressional hearings, and
16 that's the opportunity in how players obtain disability
17 benefits. This has been an ongoing struggle, an ongoing battle
18 for players for many years.

19 Mr. Meehan's firm developed the plan document
20 in 1993, and they stayed on course ever since representing the
21 Plan, representing Committee, representing the Board,
22 representing the NFL Players Association all at the same time.
23 And this is all in our brief. It's all cited with testimony.

24 So in 2009, Mr. Cloud applied for benefits for
25 the first time. He was initially denied benefits but was later

1 granted what are called line of duty benefits, which is a much
2 lower-level benefit. In 2004, he came back and asked for a
3 total and permanent disability benefits, which is a much higher
4 level. He received some total and permanent disability
5 benefits.

6 In 2006, he came -- or excuse me -- 2016, he
7 came back and requested reclassification of those benefits to
8 what are called active football benefits under the terms of the
9 Plan in Article 5. That's what this dispute is about. It is
10 the reclassification decision in the plan, which is
11 Section 5.7(b) of the plan. It requires the player to
12 establish by clear and convincing evidence a changed
13 circumstance. Neither clear and convincing evidence or changed
14 circumstance is defined in the plan.

15 What was eerie and odd and completely appalling
16 is none of the people that have provided deposition testimony
17 can tell me where the changed circumstances language came from,
18 including Chris Smith who has been on the Committee since its
19 inception in 2006. The next thing that's appalling in this
20 process, the Committee and the Board ultimately rendered
21 decisions and a written letter is provided. They never see the
22 letter. They never comment on the letter. They don't write
23 the letter. They don't make any changes to the letter. And
24 never see it before it goes to the player.

25 And in Ms. Smith's case, she said she never saw

1 the letters that she supposedly granted or -- granted or denied
2 in this case. Never saw them anytime before the preparation
3 for this deposition that we talked about.

4 So, so far what we've done is we've deposed
5 three people. This Court on July 22nd gave us authority to
6 depose Chris Smith and Patrick Reynolds, both of whom are on
7 the Disability Initial Claims Committee. They have an acronym
8 and they call it something, but I call it the "Committee."

9 So those two people have been deposed. I've
10 cited to you in our -- in our reply brief 'cause at the time we
11 filed our initial brief we didn't have the transcripts. But we
12 cited to you all of this odd, weirdness that occurred.

13 And I'll be frank with you, Your Honor, I'm a
14 sports and entertainment attorney. I'm not a full-time ERISA
15 lawyer. I'm not going to run into Mr. Meehan in another case.
16 I'm a sports and entertainment attorney. Like you were before
17 you were on the bench, I'm a AAA arbitrator that handles a lot
18 of sports and entertainment cases. I've seen a lot. I've
19 represented panels. I've represented committees. I've
20 represented boards.

21 I have never been in a circumstance where I've
22 seen people that decide a case, in theory decide the case, not
23 ever see their decision. Never read it. Never have a copy of
24 it. Don't really know what's in it. Testify that they didn't
25 give the definition of changed circumstance that's in the -- in

1 the document. That's not what they said. Nobody asked them if
2 that was the definition they would apply.

3 And, in fact, in their deposition they said --
4 and specifically Ms. Smith -- said Mr. Cloud did meet the
5 definition of changed circumstance as used in Section 5.7(b) of
6 the plan.

7 So we've got this process that is extremely
8 odd. People that really don't know what is going on. Mr.
9 Reynolds, I believe by calculation, is about 26 when he got on
10 to the Committee and was fresh out of college, a couple of
11 years at the NFL.

12 So we get to this point and now we're to the
13 point of Mr. Cloud has appealed the denial of his
14 reclassification request made by the Board -- or by the
15 Committee, I should say. He's appealed that to the Board. The
16 Board consist of three people appointed by the NFL Management
17 Council, which are all -- three individuals that work for NFL
18 teams and then three people that are appointed by the NFL PA,
19 the union for the players, which are all former NFL players.

20 There are some minutes in this case that show
21 that the decision they made to deny Mr. Cloud his
22 reclassification benefits was based on he didn't meet the
23 changed circumstances language --

24 THE COURT: All right. Let me stop you.

25 MR. DENNIE: Yes, ma'am.

1 THE COURT: Don't lose your train of thought, okay?

2 MR. DENNIE: Okay.

3 THE COURT: So who was on the committee --

4 MR. DENNIE: Yeah. Sure.

5 THE COURT: -- that denied -- what I'm talking about,
6 we're floating a lot of the dates out here -- 2016. We're
7 talking about --

8 MR. DENNIE: Okay. Correct.

9 THE COURT: -- the 2016 reclassification.

10 MR. DENNIE: Yeah. The committee -- the committee
11 members were the same in '14 and '16.

12 THE COURT: Okay. Who were on the committee? How many
13 people?

14 MR. DENNIE: Two.

15 THE COURT: And who were they?

16 MR. DENNIE: Patrick Reynolds and Chris Smith.

17 THE COURT: They were the only --

18 MR. DENNIE: Only two people.

19 THE COURT: Only two people.

20 Okay. And then it goes to the Board, and
21 you've identified six people.

22 MR. DENNIE: Correct. And those are --

23 THE COURT: Those are the six that were on the Board
24 that agreed with the Committee?

25 MR. DENNIE: At that time. Those people are different

1 now --

2 THE COURT: All right.

3 MR. DENNIE: -- but the six that we're seeking to
4 depose are those people --

5 THE COURT: That's what I'm asking.

6 MR. DENNIE: Yes.

7 THE COURT: Okay.

8 MR. DENNIE: Yeah. Katie Blackburn --

9 THE COURT: All right. And so only two people in the
10 committee, according to you, didn't see the decision, a copy of
11 the decision, didn't know the definitions of the documents, and
12 really didn't see any of the medical records, right?

13 MR. DENNIE: I didn't say the medical records. They
14 don't recall what they saw. What -- what Ms. Smith testified
15 to was she may not have read all of Mr. Cloud's medical records
16 before making a decision.

17 THE COURT: Okay. I think I saw that. But then the
18 Committee, what they do is -- then it goes to the Board?

19 MR. DENNIE: Correct.

20 THE COURT: And that's called an appeal to the Board?

21 MR. DENNIE: Appeal of the reclassification, yes,
22 ma'am.

23 THE COURT: Okay. And they're the six individuals that
24 you choose to depose?

25 MR. DENNIE: Those are the ones we're requesting.

1 THE COURT: All right. And this is a very narrow
2 question I'm going to ask you.

3 I'm going to ask you, Mr. Meehan, to listen up.

4 But what is the Board supposed to do? Are they
5 supposed to take a fresh look? Is it a de novo review of what
6 the Committee did? Or is it just -- you know, what's the
7 standard of the Board's review of the Committee? Do you know.

8 MR. DENNIE: Your Honor, my understanding is
9 Section 5.7(b) of the plan does not state one way or another.
10 But based on, you know, what I understand from getting through
11 this process is they essentially give a de novo review. They
12 start over and look at the records on their own.

13 THE COURT: Mr. Meehan?

14 MR. MEEHAN: Yes, Your Honor, I agree with that. The
15 Board's practice is to take a fresh look or a de novo review.

16 THE COURT: Okay. So, you know, analogizing to the
17 Court, you know -- if the court of appeals takes a de novo
18 review of what I do or what I do takes a de novo review of what
19 a magistrate judge does, that means you take a fresh look and
20 basically start all over and make your own decision. So are we
21 in agreement what de novo review means?

22 MR. MEEHAN: Yes, ma'am.

23 THE COURT: As far as the Board.

24 MR. MEEHAN: As far as the Board, yes.

25 THE COURT: Is that defined anywhere on their standard

1 of review?

2 MR. MEEHAN: I do not know offhand. I'm sorry.

3 THE COURT: You don't know -- now, is it true what he
4 said, that your law firm created the plan, has been involved in
5 the plan since 1993?

6 MR. MEEHAN: My understanding is that lawyers at my law
7 firm were principal drafters, but I am not personally familiar
8 with that process.

9 THE COURT: Okay. All right. But you're familiar with
10 the plan, right?

11 MR. MEEHAN: Yes.

12 THE COURT: Very?

13 MR. MEEHAN: Yes.

14 THE COURT: And you can't tell me right now what the
15 standard of review of the Board to the Committee is?

16 MR. MEEHAN: My understanding is the practice is as
17 we've described, but I cannot at the moment cite a provision of
18 the plan that speaks directly to that issue.

19 THE COURT: Do you think it exist, seriously? 'Cause
20 I'm going to go look for it. You can save me some work.

21 MR. DENNIE: It does not.

22 MR. MEEHAN: I would be happy to look for it, but
23 offhand I don't -- I don't know of a provision on that point.
24 I think it's more a practice that has --

25 THE COURT: So it's a practice that everybody assumes

1 is a de novo review, but there's nothing in the plan that tells
2 the board members what they should be doing?

3 MR. MEEHAN: I can't say yes or no, Your Honor -- I
4 apologize -- without having to look at the plan, but I believe
5 that that is correct.

6 THE COURT: And the practice of the Board -- and you're
7 real familiar with generally. I'm not talking about Michael
8 Cloud's case, but I will be talking. It's supposed to be -- I
9 mean, it's only fair, isn't it, that they just take a fresh
10 look? And they're supposed to appeal -- something that's this
11 important, they're supposed to look at everything, right, de
12 novo?

13 MR. MEEHAN: Your Honor, what -- as the Court said,
14 whether it's, quote, only fair, end quote, what I do understand
15 is that it is the practice to --

16 THE COURT: It is the practice. Okay.

17 MR. MEEHAN: Yes.

18 THE COURT: So it wouldn't be the practice if they just
19 rubber stamped it?

20 MR. MEEHAN: That is correct. And my understanding is
21 that they do not simply rubber stamp.

22 THE COURT: Okay.

23 MR. MEEHAN: They take an independent assessment.

24 THE COURT: Okay. Thank you.

25 Go back to what you were discussing before.

1 Okay. So a committee of two people reviewed Mr. Cloud's -- I
2 may be getting some of this terminology wrong, but request for
3 reclassification, right?

4 MR. DENNIE: Yes, Your Honor.

5 THE COURT: That was denied?

6 MR. DENNIE: Correct.

7 THE COURT: You deposed those two people and they
8 testified as they testified, and then it's appealed to the
9 Board. Continue.

10 MR. DENNIE: Okay. So then you go to the Board. The
11 Board reviews the same set of documents, in theory. And
12 where --

13 THE COURT: Well, we don't -- we don't know that.

14 MR. DENNIE: That's --

15 THE COURT: 'Cause nobody in this room has been able to
16 tell me what the Board's obligations are when they review the
17 Committee's decisionmaking. But go on.

18 MR. DENNIE: It is not in the plan, to my knowledge.

19 THE COURT: Okay.

20 MR. DENNIE: I reviewed the plan -- I haven't been able
21 to ask them the question yet. And, frankly, the three people
22 that have been deposed, the two committee members and the
23 corporate representative, can tell me nothing about what the
24 Board did in this case. So what I'm looking --

25 THE COURT: And I think you represented in your

1 materials that it's the Plaintiff's position that the
2 Committee and, because you deposed them, and possibly the
3 Board, didn't have access to all of Michael Cloud's medical
4 records?

5 MR. DENNIE: That's correct. That's our position for
6 certain. And kind of dovetailing off of that, if you recall --

7 THE COURT: All right. So --

8 MR. DENNIE: Yeah.

9 THE COURT: -- we have a reclassification that's
10 dependent on an analysis of many things, including whether or
11 not there's brain injury to Michael Cloud. You agree?

12 MR. DENNIE: Correct.

13 THE COURT: You agree, Mr. Meehan?

14 MR. MEEHAN: That the basis of his reclassification was
15 brain injury?

16 THE COURT: No, no. The Board's supposed to review and
17 analyze whether or not there was a brain injury to Michael
18 Cloud.

19 MR. MEEHAN: Your Honor, I would say the Board --

20 THE COURT: I'm not talking about the Board. The
21 Committee.

22 MR. MEEHAN: It would be the same for -- for both. But
23 the Committee -- the Committee is to review the application for
24 benefits and to make a determination as to whether, based on
25 the information presented, the applicant is entitled to

1 benefits.

2 THE COURT: Is it undisputed that not all of the
3 medical records were presented to the Committee or the Board
4 that -- that relate to Michael Cloud and his physical condition
5 or damage from playing in the NFL?

6 MR. MEEHAN: No. That is disputed, Your Honor.

7 THE COURT: That is disputed?

8 MR. MEEHAN: Yes.

9 THE COURT: You're saying they have everything?

10 MR. MEEHAN: I have to answer it a little bit
11 differently rather than a yes or no, is -- is that the way the
12 process -- and I'll be brief 'cause I know my turn is yet to
13 come. But the way the process works is the applicant is
14 allowed and encouraged to present, in essence, anything the
15 applicant believes.

16 THE COURT: I understand that. My question is: It's
17 undisputed that whether the applicant presented the medical
18 documents, or you got it from some other means, that not all of
19 the medical records were before the Committee or the Board?

20 MR. MEEHAN: No. That is -- that is disputed. There
21 is an allegation --

22 THE COURT: But there are other medical records out
23 there?

24 MR. MEEHAN: There's an allegation that there's one
25 specific medical record out there. We do not know whether it

1 exists, but we recognize there's an allegation of it. Neither
2 the Committee nor the Board ever reviewed it and has never seen
3 it and does not have it and does not have access to it. And we
4 don't know whether it exists, but we know the Plaintiff says it
5 does.

6 THE COURT: So the Plan's position is that Michael
7 Cloud have all the -- the Committee or the -- and/or the Board
8 have all the medical records of Michael Cloud before it?

9 MR. MEEHAN: The Defendant's position is that Plaintiff
10 has alleged that there's one medical record that no one has
11 seen that exists. That medical record, we don't know whether
12 it exists. And it was never reviewed and never presented. And
13 as a matter of law --

14 THE COURT: I'm just trying to get to a simple point.

15 MR. MEEHAN: Well, what I'm getting at is --

16 THE COURT: What I'm -- excuse me.

17 MR. MEEHAN: Sorry.

18 THE COURT: Reading all the papers in this case, there
19 appears that there is a possibility and probability that there
20 are medical records that are out there that were never before,
21 rightly or wrongly, before the Committee or the Board. I'm
22 just trying to establish what we can say is undisputed.

23 Are you disputing, or are you saying you don't
24 know that there's other medical records that were present in
25 2016 other than one document?

1 MR. MEEHAN: I -- I am saying that there is one medical
2 document that has been described as existing. I believe there
3 are other facts to suggest that there is no such document, but
4 in any event, it was never presented to the Committee or the
5 Board and therefore could not be considered.

6 THE COURT: Okay. So you are disputing that -- despite
7 all these other doctor visits that are outlined in the
8 Plaintiff's briefing and pleadings, you're disputing that those
9 medical records even exist.

10 MR. MEEHAN: I am -- I am actually trying to be even
11 more precise. There are a lot of broad statements in the
12 Plaintiff's papers. When you look at the specifics, there is
13 one and only one medical record that is alleged to exist
14 that -- that was not presented.

15 THE COURT: And which one is that?

16 MR. MEEHAN: That's the -- the allegation that at some
17 point in 2005 while Plaintiff was playing for the New England
18 Patriots, the team conducted what is known as an impact exam,
19 which is a -- an examination of an individual concerning the
20 effects of concussions. So there's an allegation that the
21 Patriots conducted that exam in 2005 at some point. There are
22 reasons, which I can get to, to question whether that really
23 occurred. But in any event, that exam, if it existed or
24 exists, was never presented and therefore never considered.
25 And as a matter of law, we would say it was not our duty to

1 obtain it.

2 THE COURT: So my effort to try to get you to answer
3 the direct question has just been kind of a waste of time on my
4 part. There have been medical visits that are outlined in the
5 Plaintiff's pleadings. They talk about doctor visits,
6 multiple. And my common sense and life experiences is that
7 every time I go to a doctor, the doctor makes record of it.
8 Probably more records than we even want.

9 So you're saying that there's only one record
10 that's out there that you don't dispute exist?

11 MR. MEEHAN: No, Your Honor. And I'm sorry to belabor
12 this, and I don't mean to try the Court's patience. But all
13 medical records known to the Plan have been turned over to
14 Mr. Cloud. There is one record, the Patriots' impact exam,
15 which the Plaintiff says exists. We have no knowledge as to
16 whether it --

17 THE COURT: Can you agree with me that if Mr. Cloud
18 went and visited all these doctors, that he -- that his lawyer
19 says he visited, that those would have created medical records
20 that were not before the Plan -- I'm sorry -- before the
21 Committee or the Board?

22 MR. MEEHAN: No, Your Honor, I can't. My understanding
23 is all those records were turned over to Mr. Cloud. So to
24 the -- to the extent they existed, they would have been
25 considered.

1 THE COURT: I'm not saying what's in -- in the
2 possession of the Committee or the Plan or the Board. I'm just
3 saying that if Mr. Cloud went to see a doctor yesterday, there
4 would be medical records that were created that are out there
5 that are not before the -- that were not before the Committee
6 or the Board, correct? That's all I'm trying to do. There are
7 some medical records that are out there that the Committee or
8 the Board or your law firm didn't have the benefit of.

9 MR. MEEHAN: I don't believe that to be true, Your
10 Honor.

11 THE COURT: Okay. So -- all right.

12 MR. MEEHAN: That's not based on the information that I
13 have. There are allegations but no support for it.

14 THE COURT: All right. Go ahead.

15 So it is disputed that there are no medical
16 records, that they don't have, that wasn't presented that
17 relate to all the things that you are saying, other than one
18 document that may or may not exist relating to the 2005
19 New England Patriots' impact exam.

20 You can continue.

21 MR. DENNIE: So, Your Honor, I'll just follow up on
22 that point for a second, then I'll jump back.

23 THE COURT: Okay.

24 MR. DENNIE: If I may.

25 THE COURT: Go ahead.

1 MR. DENNIE: So the impact exam that was done on
2 Mr. Cloud in 2005 by the Patriots, the interesting part about
3 that is it was developed by a doctor named Grant Iverson, who
4 is also involved in creating the concussion standards from the
5 Third Circuit concussion case. So, I mean, it's -- it's all
6 weaved in there. But one of the major points of this case is
7 the fact that there's an NFL repository of documents.

8 If you read earlier filings in this case, the
9 Groom law firm fought tooth and nail indicating there is no
10 repository. Well, then you depose Patrick Reynolds who, for
11 most of the time he was on the Committee, worked for the NFL,
12 he says, sure, there's a repository. Then you depose Chris
13 Smith who works for the NFL Players Association and she says,
14 oh, yeah, sure, there's a repository. And then you depose the
15 corporate representative who works for the Plan office and he
16 goes, oh, yeah, it's called the EMR repository. So there's a
17 repository of information.

18 And all sports have this, where they compile
19 electronic records so when you go from one team to the other,
20 they can just transfer with a button so everybody knows how
21 these highly-skilled athletes have been trained, have been
22 hurt. You know, whatever the issues are, it's all there.

23 THE COURT: Okay. But Mr. Meehan is disputing that
24 this impact exam by the Patriots in 2005 -- I mean, he's
25 casting a lot of doubt it even exist. What do you say about

1 that?

2 MR. DENNIE: I think that's -- that is extremely sad
3 and unfortunate to say that Michael Cloud made up that he was
4 having concussion-related symptoms and issues in 2005 to the
5 point to where he just created that he sat for a 2005 impact
6 exam.

7 THE COURT: Okay.

8 MR. DENNIE: We can't find the record. We don't know
9 where it went. We have no idea. We've asked for it. We tried
10 to get it from the Patriots. We tried to get it from them.
11 Where is it? We don't know.

12 THE COURT: Okay.

13 MR. DENNIE: But he sat for the exam and then later he
14 got cut for not remembering a play. So I don't know why they
15 take the position. They said some critical things about that
16 in the filing to this Court in opposition which, again, I think
17 is sad.

18 THE COURT: Do you have anything that corroborates
19 that, besides his word, that Mr. Cloud sat for the impact exam?

20 MR. DENNIE: We don't have a document, Your Honor.
21 Only -- only thing we can point to is Mr. Cloud's testimony --

22 THE COURT: Okay.

23 MR. DENNIE: -- that he sat for the impact exam.

24 THE COURT: Okay. Well, why don't you continue.

25 MR. DENNIE: Okay. So going back to the Board level.

1 The Board level is considering Section 5.7(b) of the plan
2 document the same way the Committee did and making a decision
3 on that. We believe there were highly questionable issues at
4 the Board level, like there were at the Committee level. But
5 what we -- where we're really getting into an issue is if you
6 look at the minutes, which we put in -- I believe it's
7 Appendix 7 of our reply brief. The minutes reference that
8 Mr. Cloud didn't meet the requirements of 5.7(b).

9 If you look at Appendix 6, which is their
10 opinion letter, it goes into all these other things. It
11 doesn't mention anything else in the minutes but has all this
12 other stuff in the letter.

13 So when I'm talking to Sam Vincent, who's the
14 corporate representative, and asked him, Who drafted that?
15 Groom firm. Did any of the members of the Board actually
16 review this before it was sent? No.

17 Somebody completely different, not on the
18 Board, not the Groom firm, but another employee of the Plan
19 signs the letter. Did he write it? No. Did anybody on the
20 Board make any comments? Are there any other comments in
21 addition to what's in the minutes as to how they arrived at
22 this alleged decision? No.

23 So this is part of the issue that we have in
24 this case. The true corporate representative that should have
25 been deposed in this lawsuit, from the Groom firm. And I don't

1 throw stones at the lawyers. I'm not hyperbolic. That's just
2 not my style. But all the information in this case in
3 preparation of the corporate rep is the Groom firm. They
4 provided -- prepared him a 132-page binder that he was
5 literally reading from in the deposition.

6 And we get to a point to where nobody knows
7 what the Board did. The two committee members, they weren't at
8 the board meeting. They didn't have any conversations with the
9 Board, according to them. Mr. Vincent, who was at the board
10 meeting, can't determine what they did, how they did, did they
11 meet in executive session, did they announce it, their decision
12 in open -- openly in the board meeting. None of that.

13 The only people that can tell us what happened
14 in the board meeting, and all three of those witnesses
15 testified to the same, is those board members. Those six that
16 we've identified -- three from the NFL side, three from the
17 players association side. Those are the only people that know
18 how they came to a decision on Mr. Cloud's case.

19 And, remember, we already have an admission
20 from the committee members saying Mr. Cloud did meet the terms
21 of changed circumstances as used in Section 5.7(b), and my
22 definition is different than what appears in this letter that I
23 never saw, didn't write, and didn't make any changes to.

24 So we're in this vortex here where the
25 controlling party of the information is the Groom firm.

1 They're trying to shield the board members who are probably
2 going to testify similarly to what the committee members said
3 about their decision, they didn't really do much. And we can't
4 get that information 'cause they're blocking it. They're
5 blocking any opportunity for us to get the information that we
6 need to make a determination on how they got to that decision.
7 And they want to cite you the cases that say look at the letter
8 that was written, look at the letter that was written.

9 The problem is we already have testimony that
10 the very people that allegedly made the decision did not review
11 or have access to the letter that was sent to Mr. Cloud. And
12 I'll be honest with you, I have advised panels in the sports
13 industry, major industry groups. I written orders. But there
14 is not a -- not a single chance, ever, that I would write an
15 order without taking their comments, sending it to them for
16 review, and having them provide their own analysis. That's not
17 a law firm's job, but that's what happened here at every level.

18 So we're in this -- this space where all the
19 information is the Groom firm. None of these people know
20 anything. But I haven't had the -- at least that I deposed so
21 far. I haven't had that opportunity to go and depose those
22 board members, and that's critical, critical to determining if
23 they met their requirements under ERISA, whether they gave a
24 full and fair review, whether they acted arbitrary and
25 capriciously, whether there's inconsistent review. Those are

1 the key issues.

2 And our position, Your Honor, is on July 22nd
3 in Docket Number 38, you've already ruled on that. You've
4 given us the opportunity to determine whether they complied
5 with ERISA regulations. You've already made that
6 determination. You didn't say it's only written discovery or
7 you can't have deposition. You said we're entitled to seek
8 discovery on those issues.

9 And based on my reading of your order, it's
10 very close to what was decided in the *Vega* and *Crosby* cases,
11 which are the two major Fifth Circuit cases on ERISA discovery.
12 And neither of those cases talked about whether it was written
13 or oral depositions as to what we could get.

14 These are huge issues for Michael Cloud. This
15 is a disabled, total and permanently disabled gentleman that
16 played in an era before concussions were recognized. The NFL
17 didn't recognize concussions as a disability, stating injury
18 until 2009. And that came -- if you've seen the movie
19 *Concussion* -- that came after Bennett Omalu studied Mike
20 Webster's brain and created or came up with the term "CTE."
21 And also as an aside, by the way, the Plan also denied
22 Mr. Webster's claim for benefits before the Fourth Circuit
23 overturned some decisions.

24 This is a standard game plan for them, is to --
25 to deny, deny, deny people that are disabled that are entitled

1 to the benefits. And the important thing to understand is, who
2 are the beneficiaries of the plan? The NFL players. Michael
3 Cloud, beneficiary of the plan. Who are the fiduciaries? The
4 board members. Those are the people.

5 So all this conversation that we're probably
6 going to hear about us requesting a counsel report and how
7 that's attorney-client privilege, I'll pump the brakes on that.
8 If you look at the case law, the actual client that the Groom
9 firm was representing were the beneficiaries of the plan, not
10 the board members. So whatever advice they gave them on the
11 administration of claim, they're trying to apply that to the
12 wrong people.

13 And I'll cite you to the *Wildbur* case, which is
14 a big Fifth Circuit case. 974 F.2d 631. A very recent case
15 out of the Northern District in 2020 which also involves a NFL
16 plan. *Advanced Physicians v. Connecticut General Life*
17 *Insurance*, 431 F.3d 857.

18 THE COURT: What are these cases that you're citing?
19 What proposition are they supposed to support?

20 MR. DENNIE: Say that one more time, Judge. I'm sorry.

21 THE COURT: Why are you citing these cases?

22 MR. DENNIE: Because the -- what you're probably going
23 to hear is them make arguments that certain things that we're
24 going to need to get into are attorney-client communication.
25 Those cases say that attorney-client communications with the

1 plan fiduciaries are not privileged because the true
2 relationship is with the beneficiaries, not the plan
3 fiduciaries.

4 So all this advice and all this process -- and
5 you have to understand the Groom firm creates the plan, they
6 advise the Committee, they advise the Board, they advise the
7 Plan office, they advise the NFL Players Association, they make
8 changes to the plan. They provide advice on Committee and
9 Board decisions and they litigate the cases. Inherent conflict
10 which, frankly, we're going to be moving for disqualification
11 here shortly anyway. But these are the issues that we're
12 trying to hide the process here.

13 And they've done pretty well at hiding it in
14 the past, and that's why you see them citing other cases. This
15 case is not like those others. No one else has known that
16 these decisions were written by the Groom firm without the
17 Board actually ever seeing it, without the Committee actually
18 seeing it, without the Committee approving these decisions,
19 without the Board approving these decisions.

20 This is a completely new landscape. All their
21 past case law is off the rails. It's not there because the
22 facts and circumstances that have been pulled out in these
23 depositions have explained what this process really is. And
24 it's alarm and appalling. Never seen anything like this. And
25 I represent all kinds of organizations and groups in this

1 industry and never seen anything like this.

2 So when -- when you look at the grand scheme of
3 things and -- and where this is -- and we've cited to you and
4 provided you excerpts of their testimony. Take a look at it.
5 You will be alarmed with some of the things that they were
6 admitting to and agreeing with.

7 So going back to, again, why it is important to
8 talk to board members. In addition to the fact that, yes, they
9 are the fiduciaries of the plan, they did decide the
10 reclassification final decision. But look at what has been
11 filed by the Defendants themselves -- or what we have -- what
12 they have responded to in discovery. They say things like the
13 Retirement Board provided a full and fair review, thus
14 providing the review by a retirement board the named fiduciary
15 of The Bert Bell plan that took into account all comments,
16 documents, and additional information submitted by the
17 Plaintiff.

18 So they're wanting us to take it as gospel
19 after learning that the members of the Board didn't actually
20 see the letter they want us to rely on. But they're pointing
21 us back to the Groom firm's own letter that they wrote without
22 approval of the Board.

23 And if you look at a response to request for
24 production, the Retirement Board is the only body that isn't
25 material to the case because the Retirement Board's decision on

1 Plaintiff's February 2016 request for reclassification -- it
2 was them that decided it. So, again, they're saying, no, go to
3 the Board.

4 We've deposed three people trying to get
5 information on what the Board did. Committee said we don't
6 know, you got to go ask the board members. Sam Vincent, the
7 corporate representative, I don't know what they did. You have
8 to ask the board members. Well, now they're blocking what all
9 their witnesses have already told us we need to go do.

10 These are the people who decided the case. Two
11 of them are lawyers, which is different than the Committee who
12 has no medical and no legal training whatsoever. Now,
13 Ms. Smith did testify that she ran across some concussion
14 studies in her job. But both of those two admit, you know,
15 they don't have any training. They may get some updates or
16 refreshers when the plan changes from the Groom firm, but they
17 don't -- they don't even think it's necessary to have any
18 knowledge of concussion in their review.

19 It's extremely important we have the
20 opportunity to talk to these people because they're the ones
21 that had to provide the full and fair review under ERISA.
22 They're the ones that couldn't act arbitrarily and
23 capriciously. They're the ones that can't provide inconsistent
24 review. Those are the things that we're going to ultimately
25 have to show you, which I believe we will based on what we've

1 already heard. But the people that made the decision are the
2 board members. That's why we need them.

3 We cited to you the cases --

4 THE COURT: I don't have the Board decision in front of
5 me, the actual document. Who signs off on the Board decision?
6 Do they all sign off or...

7 MR. DENNIE: No one from the Board signed off on it,
8 Your Honor.

9 THE COURT: There was no signature?

10 MR. DENNIE: No, nobody from the Board. Michael B.
11 Miller, the plan director, signed it.

12 THE COURT: So there's no chair of the Board or no...

13 MR. DENNIE: No.

14 THE COURT: That you're aware of?

15 MR. DENNIE: No.

16 THE COURT: So I didn't overlook that. It's not there.

17 MR. DENNIE: Yeah. Mr. Miller is another --

18 THE COURT: What is it that you are -- I know that you
19 told me off the record, before this hearing progressed on the
20 record, that you exchanged multiple e-mails with the Plan's
21 counsel, and that was since the motion was filed. At this
22 point, what is it that you are seeking?

23 MR. DENNIE: As it pertains --

24 THE COURT: I think it's laid out -- is it any
25 different than what you laid out in the Plaintiff's reply --

1 MR. DENNIE: Sure.

2 THE COURT: -- on the -- hold on. I'll read it to you.

3 In the prayer for relief, that you're seeking
4 -- tell me if there's anything different -- that you're seeking
5 the depositions of Katie Blackburn, Dick Cass, Ted Phillips,
6 Sam McCullum, Jeff Van Note, and Robert Smith to begin such
7 depositions within five days, and that Defendant be ordered to
8 produce documents responsive -- we really haven't talked about
9 that -- Request for Production Numbers 18, 37, 57, 58, and
10 second Request for Production Number 3, and then you ask for
11 attorney's fees and expenses and cost.

12 So what -- what is it that you're asking for
13 today now that you've had --

14 MR. DENNIE: The only --

15 THE COURT: -- exchanges with opposing counsel?

16 MR. DENNIE: And to be clear, Your Honor, we did talk
17 before as well. They did say they would revisit the board
18 member --

19 THE COURT: And you represented to the Court that you
20 were given some documents --

21 MR. DENNIE: Correct.

22 THE COURT: -- today. And you can...

23 MR. DENNIE: Yes. So the only thing that has changed
24 based on what we've previously submitted is they did submit
25 12 pages of records, which are pie charts. And this is what

1 we're -- what we're dealing with here.

2 During the deposition, I asked questions about
3 -- all three of them -- how many claims were filed, how many
4 were granted, how were any denied, where do we find that
5 information. The director's report, the counsel's report.
6 Both Mr. [sic] Smith and Ms. [sic] Reynolds referred to those
7 two documents. When are they prepared? Quarterly for the
8 board meeting. So these are things the Board reviews.

9 During Mr. Vincent's deposition when we were
10 asking questions about certain records and how decisions were
11 made going towards trying to determine if they were arbitrary
12 and capricious decision, whether a full and fair review was
13 granted, whether anything was inconsistently decided, he
14 brought up, oh, we have a database where we log all of that.

15 And I asked him, Do you have the ability to
16 make queries?

17 And he said, Yeah, we can run queries for total
18 and permanent disability. We can determine whether someone
19 received active football benefits or inactive benefits or
20 denied. We can run query on that.

21 I said, Well, if you run a query, how far back
22 can you go?

23 Well, only since the system was created, which
24 I think was between 2011 and '13.

25 I asked him, Well, how many --

1 THE COURT: Okay. Well, I think you're kind of...

2 MR. DENNIE: I'm trying to...

3 THE COURT: I think you're trying to explain the pie
4 charts that were given to you as opposed to answering the
5 Court's question which is, what is it that you want today?

6 MR. DENNIE: Nothing's changed.

7 THE COURT: Okay.

8 MR. DENNIE: Other than we got these 12 pages. I was
9 just trying to explain what else is out there that's not in
10 these 12 pages of pie chart.

11 THE COURT: Okay. So you are still seeking the same
12 relief that's set forth in the prayer for relief in the reply,
13 correct?

14 MR. DENNIE: Yes, Your Honor. You brought up -- I
15 believe we were not on the record at that point, but they have
16 filed a summary judgment since then. We were hoping to also
17 address response deadline because we believe this discovery
18 that we're requesting here, we need this to, one, because we're
19 entitled to it. But --

20 THE COURT: I'll get to that. What about -- we talked
21 a lot about the depositions that you want. You want to comment
22 any further on the request for production documents that you
23 are seeking?

24 MR. DENNIE: Yeah. The request for production are in
25 two categories. That's the -- what I was talking about -- the

1 director's report, counsel's report, plan database where you
2 can run queries, which Mr. Vincent testified there are
3 hundreds, not thousands, of what they can spit out into an
4 Excel spreadsheet that shows whether claims were granted,
5 denied, what benefits were granted and, you know, what time
6 periods so we can try to make a determination whether there was
7 an inconsistent review.

8 Counsel's report, director's report, as I
9 mentioned, are documents that all of their witnesses have
10 referred to is what I need to see. And they're prepared
11 quarterly. So it's not like this is a document that's prepared
12 365 times a day -- I mean, a year. It's a quarterly report
13 that's presented to the Board at the board meeting.

14 So that's --

15 THE COURT: So you're asking for a quarterly report?

16 MR. DENNIE: Yeah. There's two of them.

17 THE COURT: Okay.

18 MR. DENNIE: Counsel's report and a director's report,
19 which Ms. Smith said that the counsel's report addresses things
20 that are not just legal in nature. Again, as I mentioned
21 before, we still take the position that the advice that they
22 provide is not privileged. But, you know, those -- those are
23 the three documents that we are looking for on that side.

24 The medical records. He was -- Mr. Cloud was
25 sent to three plan doctors. We received for the first time

1 ever documents from Dr. Canizares on July 29, 2021. There are
2 some outstanding documents to Dr. Mandelbaum -- from
3 Dr. Mandelbaum, who was another plan physician. They initially
4 took the position that Mr. Cloud saw him at the direction of a
5 team after we presented them with a document confirming they
6 agreed that he is a plan physician. We haven't seen those
7 documents.

8 We also believe that we should have access to
9 the medical repository of records that all the witnesses have
10 testified to. Each of them said they didn't know how to access
11 it. But Ms. Smith testified she would refer Mr. Cloud to the
12 Plan to get those records and, frankly, that's what Mr. Cloud's
13 testimony would be, that he called the players association and
14 the players association told him to call the Plan office to get
15 his medical records because he was a retired player. And that
16 the Plan office told him and his now ex-wife, you know, we'll
17 get you the records. And that's a part of the issue in this
18 case as well.

19 The first time in January 2019, Mr. Cloud gets
20 an e-mail from the Groom -- Groom firm providing 860 pages of
21 records. If you look at the administrative record, it's 529
22 pages. Then in this lawsuit, in addition to -- to the
23 administrative records, the Groom firm presented 1500 pages of
24 ex file records. So we keep getting different records that
25 they're saying weren't in the administrative record, but we

1 keep getting new records. Why weren't they in the
2 administrative records? Nobody can answer that question,
3 either.

4 So there's a lot of things out there that are
5 prohibiting us from putting on the full facts in this case.
6 It's pretty simple though, ultimately. Mr. Cloud's disabled.
7 He meets the definition of Section 5.7(b). He was not provided
8 a full and fair review. They're going to try to rely on what
9 the Board did and say, see, they met the ERISA regulation by
10 presenting this letter here that we prepared. And we went.
11 That's the position they're trying to take in this case. So
12 they're attempting to foreclose our ability to get the
13 information we need.

14 And I've already deposed three people without
15 key documents that I should have received, frankly, in response
16 to initial disclosures. And now I'm trying to get those so I
17 can depose these board members.

18 THE COURT: Okay. Anything else that's not already in
19 your papers?

20 MR. DENNIE: Yeah. The only other thing, as I said,
21 Your Honor -- you may want to take this up later -- is, you
22 know, we -- if this case is going to be restructured from a
23 timing standpoint, we would want that --

24 THE COURT: Okay. Let's make sure we do that before
25 you leave the room today, okay?

1 MR. DENNIE: I just want to make sure that if you're
2 going to grant us depositions, we get the opportunity to take
3 those before having to respond to the summary judgment.

4 THE COURT: Thank you.

5 MR. DENNIE: Thank you.

6 THE COURT: We've gone about an hour, but I can keep
7 going. But we can take a break if either lawyers need it.

8 MR. MEEHAN: Personally, I'm happy to go straight
9 through as long as Your Honor wants.

10 THE COURT: Okay. Are you okay, Mr. Dennie?

11 MR. DENNIE: I'm fine, Your Honor.

12 THE COURT: Let's keep going. Go ahead.

13 MR. MEEHAN: Your Honor, we --

14 THE COURT: And, remember, we're here on a motion to
15 compel. Go ahead.

16 MR. MEEHAN: I understand. Your Honor, we do agree on
17 one thing. I say Plaintiff and Defendant, we do agree on one
18 thing. And as best I took it, this is my quote from
19 Plaintiff's counsel that this is, quote, a completely new
20 landscape, end quote. We absolutely 100 percent agree.

21 What is happening in this case has never
22 happened before, ever, to our knowledge in any case involving a
23 review of a benefits decision. What Plaintiff is asking Your
24 Honor to do, four square, violates blackletter, en banc
25 opinions of the Fifth Circuit. If Your Honor goes down the

1 path that Plaintiff is asking the Court to go, it is reversible
2 error. What the Court has already permitted is beyond what the
3 Fifth Circuit has allowed.

4 We cooperated -- well, I would say, one, we
5 attempted to persuade Your Honor not to order those
6 depositions. Your Honor ordered them and so we complied. We
7 produced the two committee members. We went beyond that in an
8 effort to try to avoid where we are today, arguments that are
9 really conclusory in nature, very few specifics about failings
10 in the process.

11 When we received a notice for a
12 51-topic 30(b)(6) deposition, we engaged in communications
13 designed to clarify what Plaintiff wanted. We did not come to
14 Your Honor to block that deposition. We had hoped that by
15 participating in that deposition that we would be addressing
16 Plaintiff's concerns to the best of our ability and to be able
17 to come back on a record and show to Your Honor that we have
18 attempted to cooperate.

19 What -- what Your Honor's hearing is an awful
20 lot of adjectives, an awful lot of conclusory statements. The
21 facts here are that there are over 1200 -- I think close to
22 1300 pages of deposition transcripts from three witnesses. It
23 is remarkable that these depositions each generated on or about
24 in excess of 400 pages.

25 We -- and I -- and I handle -- I don't know if

1 the Court's aware, I handled, I defended each of those
2 depositions. And although there were some colloquy, I tried to
3 be off the record as much as possible. Not a single question
4 did I instruct any witness not to answer.

5 I did note at the outset of the first
6 deposition, Mr. Reynolds' deposition, that Your Honor had
7 entered the -- the order in July 22nd, Docket 38, which
8 identified three and only three areas of discovery, and I
9 asserted a standing objection to going outside those three
10 areas. Not -- respectfully, Your Honor, not conceding that
11 those three areas were proper, but we had a court order in
12 front of us and we had no choice but to comply with it at that
13 point as we thought in an effort to try to resolve things in a
14 cooperative way. And Plaintiff's counsel made quite clear he
15 was not restricting himself to Your Honor's Document 38,
16 July 22nd, '21, order. He was going to ask anything he wanted.
17 And he did.

18 If the Court reviews those transcripts, the
19 breadth of the topics. And, yes, references to Mr. Webster and
20 suicide notes and how does it make you feel to deny someone's
21 claim and an outburst from Mr. Cloud off the record which was
22 then brought on to the record in part. These were highly
23 theatrical, highly emotional and completely new landscape
24 discovery.

25 Because the answer to -- to why we're here is

1 on Page 15 in Plaintiff's reply on the motion to compel. And
2 -- and I can read it. There's just a sentence in there I
3 wanted to bring out.

4 THE COURT: I got it in front of me. Go ahead.

5 MR. MEEHAN: Okay. Page 15, Paragraph Number 9, third
6 sentence.

7 THE COURT: Well, my Page 15 is different than yours.
8 So go ahead and read it to me.

9 MR. MEEHAN: All right. Sorry. Yeah. So typed
10 Page 15 in the reply. Third sentence reads: "Cloud is
11 permitted to obtain discovery regarding any nonprivileged
12 matter that is relevant to any parties [sic] claim or
13 defense..."

14 There was a typo there on parties, but that's
15 what we all know was -- was meant to say.

16 That's wrong. That's wrong. Blackletter law,
17 Fifth Circuit. That's wrong. That is pertaining to a -- a
18 more general tort case or something else where discovery is
19 very broad in the Fifth Circuit. And counsel cited the *Vega*
20 and *Crosby* cases. Yes, those are excellent cases to read.
21 *Vega* and *Crosby* say that this sentence I just quoted is wrong.
22 And when I say "wrong," what I mean is that's a general rule of
23 discovery. It doesn't apply here.

24 Where we are, this Court is sitting, in
25 essence, as a court of review, almost as if this were a court

1 of appeals. And the focus of the case is on the administrative
2 record. What is inside the administrative record is what the
3 Court reviews to determine did the decisionmaker here have a
4 rational basis for the conclusion that was reached?

5 *Vega* and *Crosby* are crystal clear that you
6 don't go outside of that. And *Crosby* -- and this is at 647
7 F.2d -- I'm sorry, F.3d 258 and the jump cite comes to 261 --
8 makes it clear that -- and this is a quote. "Although a court
9 is afforded broad discretion when deciding discovery matters,
10 the court abuses its discretion when its decision is based on
11 an erroneous view of the law."

12 And, Your Honor, I'm saying this, I mean, this
13 with great respect to all. This is the path the Court is being
14 led down to, is to make a decision on discovery based on an
15 erroneous view of the law. In the Fifth Circuit, as *Crosby*
16 says at Page 262, continuing to 263, is that the precedent in
17 the Fifth Circuit -- and they're referring to *Vega*, which I'll
18 quote in a moment. "With respect to material factual
19 determinations -- those that resolve factual controversies
20 related to the merits of the claim" -- which is what this is
21 all about, supposedly that the wrong classification was put in
22 place and a different approach and a different conclusion to
23 the breach. That's an argument on the merits.

24 The Court may not consider evidence that was
25 not part of the administrative record with very few exceptions.

1 That comes, then, back from the *Vega* case which was the en banc
2 decision where this whole issue of what discovery is allowed in
3 this type of administrative review case. And *Vega* was crystal
4 clear.

5 Let me give you the -- I should give you the
6 page, cite here for a moment. This is 188 F.3d 287 is where it
7 starts. And if we jump over to 298.

8 "We hold today that the administrative record
9 consists of relevant information made available to the
10 administrator" -- that's the plan here -- "prior to the
11 complainant's filing of a lawsuit and in a manner that gives
12 the administrator a fair opportunity to consider it."

13 That's why I was trying to take such pains --

14 THE COURT: What are the exceptions?

15 MR. MEEHAN: There are. If -- and I'll do this from
16 memory without grabbing the quote. Interpretation of a plan
17 term.

18 THE COURT: Well, that's been brought up today. Okay.
19 Keep going. Next exception?

20 MR. MEEHAN: Well, I would suggest we -- we should
21 focus on whether any discovery goes to that issue because it
22 does not.

23 THE COURT: Okay. But keep going on the exceptions.

24 MR. MEEHAN: If -- if the Court requires expert medical
25 testimony to understand terminology.

1 THE COURT: Right. Okay.

2 MR. MEEHAN: The Court has already rejected that in the
3 past. And then if -- there are a few exceptions. There are
4 also issues where a plaintiff can contest whether the
5 complete -- administrative record is complete.

6 THE COURT: And I think that's being done here. Okay.

7 MR. MEEHAN: Your Honor allowed discovery on that
8 point. We would suggest to the Court that discovery is not --

9 THE COURT: So there's two potential --

10 MR. MEEHAN: -- permitted on that --

11 THE COURT: Are there at least two potential exceptions
12 to the general rule that you're citing, which the Court is
13 aware of, in *Vega* and others that at least -- and I agree with
14 you that there's been a lot of conclusory statements made by
15 your opposition, okay? I'm in agreement with that. But there
16 are some kernels in there that -- including the couple of
17 exceptions that you threw out. I don't think you cited all the
18 exceptions, but they were the two that I was looking at.

19 MR. MEEHAN: Well, Your Honor --

20 THE COURT: And so you're saying that the two people on
21 the committee level didn't know anything about -- well, I
22 haven't read the whole deposition. So you -- and you haven't
23 really been able to do a sur-reply to the reply. But it seems
24 like they're saying they didn't look at anything, they weren't
25 given this and that, you know. At least the Plaintiff's

1 counsel is arguing at least two of the exceptions apply.

2 Are there any other exceptions?

3 MR. MEEHAN: Well, it -- there are no other exceptions
4 that would apply. And, Your Honor, we don't agree those do.

5 THE COURT: Okay. Any other exceptions that -- I'm not
6 asking whether you agree that they apply 'cause I know what
7 your position on any exception applying. But any exceptions?

8 MR. MEEHAN: There are -- there are exceptions, Your
9 Honor. It is our review --

10 THE COURT: Can you tell me what they are?

11 MR. MEEHAN: There had been suggestions that issues
12 about compliance with ERISA procedures can be looked into.

13 THE COURT: Okay.

14 MR. MEEHAN: And that's all that I can recall at the
15 moment --

16 THE COURT: Okay.

17 MR. MEEHAN: -- Your Honor.

18 THE COURT: Continue. Thank you.

19 MR. MEEHAN: Just very briefly, Your Honor.

20 THE COURT: And I think the third exception that you
21 just threw out is another one that, at least the Plaintiff's
22 counsel is alleging, may be worthy of discovery, but okay.

23 MR. MEEHAN: Your Honor -- Your Honor --

24 THE COURT: I'm not saying I agree with him. I'm just
25 identifying the issues that you're saying as a general rule no

1 but there's some exceptions, and you threw out some exceptions
2 off the top of your head. I've got them written down up here.
3 And three of them that I can identify, there's allegations that
4 they may be applicable in this case. But you continue.

5 MR. MEEHAN: There are conclusory assertions. And the
6 point there, Your Honor, is I would urge the Court to require
7 Plaintiff to be specific. If we're pursuing a failing of an
8 ERISA requirement, can we specify it? Because our efforts off
9 the record, on the record interchanges with counsel have been
10 completely unsuccessful in having Plaintiff identify a single
11 shortcoming under ERISA or -- or the applicable regulations.

12 So for example -- and I'll come back to the
13 point that I was going to make here in just a moment, but to
14 follow this. For example, to say that no board member is a
15 doctor, we concede it. No need for discovery. But that's not
16 an ERISA violation. No committee member is a doctor, concede
17 it.

18 THE COURT: Is it an issue in your eyes if committee
19 members or board members, we don't know, never see the decision
20 or a copy of their decision before they sign off on it or even
21 know or understand what definitions are to be applied or what
22 they mean? Is that...

23 MR. MEEHAN: Your Honor, that's a hypothetical
24 question.

25 THE COURT: No. That was read to me from deposition

1 testimony, or excerpted.

2 MR. MEEHAN: That's not what the deposition say.

3 THE COURT: What did the deponents say? Did any of the
4 deponents say that they read or saw their decision before they
5 signed off on it?

6 MR. MEEHAN: Neither of the committee members testified
7 that they -- that they read the decision letter before it went
8 out. That part is correct.

9 THE COURT: What about they even saw a copy or had
10 input into it?

11 MR. MEEHAN: They both testified that the decision
12 letter reflected their decision. They did not choose the words
13 they made the decision. And there are --

14 THE COURT: Did they make the decision before the
15 decision was memorialized?

16 MR. MEEHAN: Yes.

17 THE COURT: Was there testimony to that effect?

18 MR. MEEHAN: Yes. And they testified they did. These
19 committee members made the decision at that level and then
20 it -- and then the decision was put in letter form, according
21 to the witnesses, by an employee of the plan benefits office.

22 THE COURT: Did --

23 MR. MEEHAN: Following standard practice.

24 THE COURT: Did the -- did one of the deponents admit
25 that Mr. Cloud meets the definition of changed circumstances.

1 MR. MEEHAN: No. Ms. Smith, after being asked a long
2 series of hypothetical questions, which do not accurately state
3 the facts concerning Mr. Cloud, answered in the hypothetical.

4 THE COURT: Okay.

5 MR. MEEHAN: To the effect of, okay, everything you're
6 saying, counsel -- and these are not her words. This is my
7 translation. If everything you're saying is true, that may.
8 That may. It was a hypothetical. And then she went on to add
9 why the claim was denied notwithstanding all of those
10 assumptions.

11 THE COURT: Okay.

12 MR. MEEHAN: This is what I'm getting at. The
13 conclusions being argued from these transcripts cannot -- and,
14 Your Honor, please don't -- please don't just take my
15 conclusions, either. I am giving them in good faith, and I --
16 I have to trust that counsel for Plaintiff is doing the same.
17 But rather than rely upon our interpretations or our memories,
18 the transcript themselves need to be looked at.

19 Ms. Smith did not admit that, and she -- none
20 of the witnesses -- wait. I'm sorry. 'Cause I may be
21 interrupting Your Honor. I was going to go to the other
22 points, if that's okay.

23 THE COURT: Well, is there a definition of changed
24 circumstances or clear and convincing evidence?

25 MR. MEEHAN: Changed circumstances is defined in at

1 least two -- two cases.

2 THE COURT: No. I meant in the plan.

3 MR. MEEHAN: At that time in the plan, I believe there
4 was no specific definition. It was left to...

5 THE COURT: Whatever they felt like?

6 MR. MEEHAN: No, not at all, Your Honor. What it was
7 left to was many years of practice and the -- the ordinary
8 definitions of those terms. What the witnesses all testified
9 to is they had an understanding of what it meant.

10 THE COURT: Okay. But bottom line is there was no
11 definition, right?

12 MR. MEEHAN: No, I would not agree with that, Your
13 Honor. The bottom line was --

14 THE COURT: In the plan, it was not defined?

15 MR. MEEHAN: There is -- there is no defined term in
16 the plan but there were 15, 16, 17 years of practice --

17 THE COURT: I understand.

18 MR. MEEHAN: -- which is another way to define the
19 term.

20 THE COURT: I'm going to be the decisionmaker on the
21 case, and I'm looking for specific information. I'm not trying
22 to play devil's advocate. Okay? So I know how you're going to
23 say, but that's not relevant or but, you know, we have years of
24 practice. But I just want to make sure --

25 MR. MEEHAN: Well, Your Honor --

1 THE COURT: -- that there is no definition in the plan
2 of clear and convincing evidence or changed circumstances.

3 MR. MEEHAN: At that time there was not. And, Your
4 Honor, what I'm --

5 THE COURT: Is there now?

6 MR. MEEHAN: Pardon me?

7 THE COURT: Is there now? You keep saying "at that
8 time." That implies that there is a definition now.

9 MR. MEEHAN: I believe there has been one. But --

10 THE COURT: On both those terms?

11 MR. MEEHAN: At this time -- at this time in question
12 there was not in the plan.

13 THE COURT: Okay. So at one point -- let's take each
14 term by itself. There was a -- there was no definition of
15 changed circumstance in the plan?

16 MR. MEEHAN: As a defined term in the plan, no.

17 THE COURT: There is now a definition of changed
18 circumstance in the plan?

19 MR. MEEHAN: I would have to look to determine that,
20 Your Honor.

21 THE COURT: I thought you just told me.

22 MR. MEEHAN: I'm speaking only to the time when
23 Mr. Cloud's decision was made.

24 THE COURT: Okay. I thought you just represented to
25 the Court 'cause you keep being very careful, as lawyers need

1 to be, that at the time of Mr. Cloud's hearing, whatever you
2 call, review, there was no definition. But you keep saying "at
3 that time," and what that implies to the Court is subsequent to
4 it there was a definition. Do you know if there was a --
5 there's a definition subsequent to -- "at the time" I guess
6 would be 2016?

7 MR. MEEHAN: Right. 2014 through 2016 -- well, 2016 in
8 this case, yes.

9 THE COURT: Right. So is there a definition since
10 2016? That's only five years ago.

11 MR. MEEHAN: I can't -- I can't say that. I believe
12 the Plan follows the definitions that are memorialized in the
13 two Maryland cases that are cited in our papers.

14 THE COURT: Okay. So you don't know if that's -- it's
15 in there right now?

16 MR. MEEHAN: I do not.

17 THE COURT: Okay. Or any definition? You just think
18 it might be?

19 MR. MEEHAN: No. I'm stating nothing on that point,
20 Your Honor.

21 THE COURT: Okay. What about clear and convincing
22 evidence? At the time, 2016, there was no definition of that?

23 MR. MEEHAN: It was not a defined term beyond -- beyond
24 the normal usage.

25 THE COURT: No. A defined in the term. I mean, I

1 can -- I just might -- is that something that's been produced
2 in this case, the actual plan? 'Cause I can go look it up.

3 MR. MEEHAN: Yes.

4 THE COURT: 'Cause I think it will be faster for me to
5 look it up than get a straight answer from you.

6 MR. MEEHAN: Your Honor, I'm sorry. I don't mean to
7 quibble, and I don't know why the Court would think I'm not
8 giving you a straight answer.

9 THE COURT: I am asking for what is defined in writing
10 in the plan. Is changed circumstance in writing in the plan in
11 2016; you said no. Is clear and convincing evidence as defined
12 in the plan in black and white in 2016; you said no. But now
13 you're saying, oh no, maybe.

14 MR. MEEHAN: No.

15 THE COURT: Neither of those were defined in the plan?

16 MR. MEEHAN: In 2016 neither of those terms --

17 THE COURT: Okay.

18 MR. MEEHAN: -- were defined in the plan.

19 THE COURT: Let's start with clear and convincing
20 evidence. Has that term since been changed in the plan?

21 MR. MEEHAN: I don't know.

22 THE COURT: And same thing with changed circumstances.

23 MR. MEEHAN: As defined in the plan, I don't know.

24 THE COURT: Okay.

25 MR. MEEHAN: Your Honor --

1 THE COURT: You can continue.

2 MR. MEEHAN: Your Honor, again, testimony, it was
3 described that all of the witnesses acknowledged that there was
4 a repository. Each of the witnesses acknowledged that under
5 the 2011 collective bargaining agreement, that there was to be
6 created a medical repository. Each of the witnesses -- and
7 again, my memory, you'll check the transcripts -- indicated
8 that they did not know the extent to which such a repository
9 had been fully implemented.

10 Mr. Vincent, who had the most knowledge on the
11 topic, indicated that the repository was in process of being
12 created, had limits, not necessarily all teams were subscribing
13 to it. And that his understanding, no team created a
14 repository for medical information for any player who was no
15 longer active. And that as of the time the repository was
16 being created, there would be historical data but only for
17 active players. So there is -- based on that information,
18 there is no reason to suggest that -- that there is anything in
19 this repository that relates to Mr. Cloud because he went
20 inactive after the 2005 season.

21 THE COURT: Did the Plan look for any information in
22 the repository for Mr. Cloud?

23 MR. MEEHAN: No. The Plan has no access to it.

24 THE COURT: Who has access to it?

25 MR. MEEHAN: It's -- it's being -- it's run by the

1 League. It is not the Plan's repository.

2 THE COURT: The Plan has no access to it whatsoever,
3 even -- you can't -- you never requested? Nothing? You have
4 no access to it, period? That's what you're representing on
5 the record?

6 MR. MEEHAN: That is my understanding, based on the
7 depositions and the discussions that occurred.

8 THE COURT: All right. Continue.

9 MR. MEEHAN: Your Honor, the -- the Groom firm did
10 write the decision in 2016 concerning Mr. Cloud. The Groom
11 firm as plan counsel, just as corporate counsel would be in any
12 normal instance, attends the boards meetings. The Board made
13 its deliberations reflected in the minutes which are, of
14 course, fairly cursory as minutes typically are.

15 Counsel expanded by providing the appropriate
16 plan provisions so that all of that would be available for the,
17 in this case, the applicant to see and gave the appropriate
18 detail laying out the three reasons why the reclassification
19 was denied. It's not unusual. And that's what happened. And
20 everyone agrees on that. There is no violation of ERISA
21 regulations for plan counsel to write the decision letter after
22 the Board has made the decision.

23 And the reason I'm citing this is this idea --
24 Your Honor, it's crystal clear that the Court is very
25 sympathetic to Mr. Cloud and is troubled by some of the

1 assertions that are being made. But I'm trying to keep us
2 focused, Your Honor, on the -- the rule of law and not to make
3 the reversible error --

4 THE COURT: The Court is not sympathetic or
5 unsympathetic. I would like to get to the bottom of this. I'd
6 like to know what the full picture is. The Court would like to
7 know what went into the Committee's decisions and the Board's
8 decisions.

9 MR. MEEHAN: Your Honor --

10 THE COURT: I -- you know, within the bounds of what is
11 appropriate. I think there's a light that needs to be shined
12 on this. And you-all need to tell me -- you know, you guys are
13 telling me polar opposites, and so I'm going to be asking for
14 supplemental briefing with the depositions attached.

15 You told me -- you told me that this is
16 thousands of pages of depositions. I don't intend to go
17 through every single page, but you certainly can pull that --
18 those pages that are relevant to what's being argued today. So
19 I will go look at it.

20 MR. MEEHAN: Thank you, Your Honor.

21 THE COURT: But to imply that the Court's going to make
22 a decision because of sympathy is just something that I haven't
23 done and will not do.

24 MR. MEEHAN: But, Your Honor --

25 THE COURT: So...

1 MR. MEEHAN: I'm sorry. I didn't mean to interrupt.

2 THE COURT: And he is a sympathetic -- as anybody with
3 brain damage would be, but that has nothing to do with my
4 decision.

5 MR. MEEHAN: And, Your Honor, he was accepted in 2014
6 as totally and permanently disabled by the Plan and awarded
7 benefits and that -- that continues today. The issue is not is
8 he totally and permanently disabled as the plan would define
9 it, but does he meet the criteria in the plan to move to a
10 different level. That's all.

11 THE COURT: Understood.

12 MR. MEEHAN: So, Your Honor, this issue -- and I take
13 it the Court is trying to understand the basis of the decision
14 that the Board made and to decline -- to move Mr. Cloud to
15 active football, and that's what -- that's what Plaintiff is
16 seeking by these depositions.

17 The problem there, from a --

18 THE COURT: You don't think the Plaintiff is just
19 attempting to find out if the Plaintiff had a reasonable
20 opportunity whose claim has been denied for full and fair
21 review?

22 MR. MEEHAN: Well, that's already demonstrated by the
23 administrator of record, Your Honor. That's the issue here,
24 is...

25 THE COURT: No. That's what's before the Court, is

1 whether or not the Plaintiff has -- was afforded a reasonable
2 opportunity, his claim for benefit was denied for a full and
3 fair review, right?

4 MR. MEEHAN: And the -- and the way the court --

5 THE COURT: By the Board?

6 MR. MEEHAN: And -- correct. And the way the court in
7 this circuit resolves that question is by reviewing the
8 administrative record and what opportunity, if any, was
9 provided to the claimant to present information.

10 The documents in the administrative --

11 THE COURT: Are you aware of the *Dimry* case that was
12 just decided a couple of weeks ago?

13 MR. MEEHAN: Yes, I am aware of it.

14 THE COURT: Did you argue that?

15 MR. MEEHAN: I argued it at the Ninth Circuit, yes.

16 THE COURT: Okay. And you lost, didn't you?

17 MR. MEEHAN: On -- on a specific ground, yes.

18 THE COURT: The Court -- are you aware of the *Dimry*
19 case?

20 MR. DENNIE: Yes, Your Honor.

21 THE COURT: Okay. So the plan --

22 MR. MEEHAN: The ground in *Dimry*, Your Honor, was not
23 related in any way to any issue in front of this Court.

24 THE COURT: Do you think *Dimry* may be relevant to the
25 Plaintiff's claim which invokes the same procedural provision

1 that the Plan wrongly denied him benefits due in accordance
2 with the plan documents?

3 MR. MEEHAN: No. Your Honor, in -- in *Dimry*, the Ninth
4 Circuit concluded that after there had been two remands -- and
5 at the second remand the Plan presented all of the information
6 in the record to a physician to review -- that the Ninth
7 Circuit concluded that before the Board could render its final
8 decision once that doctor reviewed everything, the Plan should
9 have given to the -- the claimant in that case an opportunity
10 to review the doctor's report.

11 The Plan's position was that the doctor
12 reviewed all of the issues that had been identified by the --
13 by the claimant, and so with that, in the Plan's view, was an
14 unnecessary extra step. The Ninth Circuit disagreed, and it
15 was remanded on that basis.

16 THE COURT: Okay. The Ninth Circuit is clearly not
17 binding case law to this Court, but I just found it kind of
18 interesting that this was just decided -- actually, I found
19 this case, not even my law clerks did, on August 10th. So I
20 just found that pretty interesting.

21 MR. MEEHAN: It's in the -- it's an opinion not for
22 publication, Your Honor.

23 THE COURT: Well, but I still found it. Okay? And,
24 you know, I can look at other circuits and courts for, you
25 know, persuasion.

1 MR. MEEHAN: Of course. And, Your Honor --

2 THE COURT: It's not binding.

3 MR. MEEHAN: -- what I'm getting at is this issue of
4 Plaintiff is trying to inquire into the basis of the decision.
5 What I am saying is the decision rises or falls on the
6 administrative record. And --

7 THE COURT: Unless one of those exceptions apply,
8 right?

9 MR. MEEHAN: Well, unless one of those exceptions
10 apply.

11 THE COURT: Okay.

12 MR. MEEHAN: But that's where the *Borelli* case from the
13 Eastern District of Texas --

14 THE COURT: Also not binding but tell me about that.

15 MR. MEEHAN: Correct, not binding. 2005 WL 8160870 at
16 Asterisk 2 is talking about how an individual in that case
17 whose name was *Borelli*, his "Notice of deposition... states
18 that he seeks to depose a corporate representative about 'the
19 basis for the denial of Plaintiff's claim for long-term
20 disability benefits.' His notice does not indicate that he
21 seeks to discover evidence, admissible or otherwise, about plan
22 interpretation, or any other issue on which the Fifth Circuit
23 has permitted plaintiffs to supplement the administrative
24 record. Because *Borelli* seeks to depose a corporate
25 representative about a question which the Court may not

1 consider in determining whether the Plan administrator abused
2 its discretion, this motion is hereby DENIED."

3 That's what's happening here. The Plaintiff
4 wants to depose each and every member of the -- of the board on
5 the basis for their decision. And I know that because that is
6 a direct quote from the emergency motion, that the -- quote,
7 the only people who know the basis of the decision to decline
8 benefits to Cloud, et cetera, are the Board. And that's why he
9 wants to take the deposition. And, again, all those
10 accusations about, quote, hiding the ball and shielding Cloud
11 from the facts of the case. That's at the emergency motion,
12 Paragraph 28.

13 What the *Borelli* case is pointing out is
14 consistent with the Fifth Circuit law. It is an error of law
15 to allow those depositions because they are going to a subject
16 that is not within one of the exceptions.

17 If we cannot persuade this Court on the
18 administrative record that we acted rationally, if the Court
19 looks at that and -- and determines that the Plaintiff has
20 shown that we acted arbitrarily or capriciously, that's all the
21 Court needs for a decision. And that's -- Your Honor, I have
22 to ask because there were some references off the record to the
23 effect that the Court is contemplating holding a trial here.
24 There is no trial in this case. It is summary judgment, up or
25 down.

1 THE COURT: I know that's what your position is. And
2 my references were when I was talking to you about was a
3 scheduling order that was moving the trial date and all the
4 deadlines to it. So, yes, you made it very clear from your
5 very first pleading that you think you should win based on a
6 dispositive motion, and I disagreed with you so far. But I
7 have not reached the merits of the summary judgment motion yet,
8 okay? We're here on a discovery issue. You may very well have
9 a trial if you don't make it past this summary judgment. I
10 mean, if you -- if the summary judgment is denied. I don't
11 know. I haven't looked at the merits of that yet.

12 MR. MEEHAN: Your Honor, that's -- that's --

13 THE COURT: So...

14 MR. MEEHAN: -- that's the area --

15 THE COURT: But I'll be focusing on these exceptions.

16 MR. MEEHAN: Okay.

17 THE COURT: So what else do you have to say that's not
18 in -- in your pleadings?

19 MR. MEEHAN: Okay.

20 THE COURT: Because I probably won't be making a
21 decision today 'cause I've got more reading to do.

22 MR. MEEHAN: Thank you, Your Honor. Just a few more
23 items, if I may.

24 THE COURT: Go ahead.

25 MR. MEEHAN: Thank you. And I appreciate the Court's

1 indulgence.

2 THE COURT: It's not my indulgence. I'm very
3 interested in this, and I really want to hear what you have to
4 say.

5 MR. MEEHAN: Thank you, Your Honor. It is an
6 interesting area.

7 THE COURT: Especially if both of you are agreeing that
8 this is uncharted waters. I wish I didn't have a mask on. I'm
9 smiling right here, so...

10 MR. MEEHAN: Well, I understand that.

11 THE COURT: Let's continue.

12 MR. MEEHAN: I know the Court understands. We agree
13 it's, as you put it, uncharted waters or -- or completely new
14 landscape, as Plaintiff's counsel put it, but for different
15 reasons.

16 So the point here is discovery must fit within
17 an exception because, as *Vega* said on the same page I was
18 quoting earlier, "We will not permit the district court or our
19 own panels to consider evidence introduced to resolve factual
20 disputes with respect to the merits of the claim when that
21 evidence was not in the administrative record." Which is why I
22 say we rise or fall on the administrative record.

23 If the Court looks at the record and concludes
24 that there's evidence in there that was not adequately
25 considered by the Board --

1 THE COURT: Or the administrative record was not
2 complete or whether the Defendant complied with ERISA's
3 procedural regulations and any of the exceptions. Right, I get
4 that.

5 MR. MEEHAN: But in that regard, Your Honor, we already
6 know all that we need to know and so much more without any
7 further depositions. What we know from the administrative
8 record is there were repeated opportunities for Mr. Cloud to
9 present anything and everything he wanted. And I -- I heard
10 earlier today that efforts were made to obtain the impact study
11 from the Patriots. I have not seen a subpoena. This case has
12 been around for -- since May of '20, if I recall correctly. I
13 haven't seen a subpoena.

14 THE COURT: Has the Plan or anyone on its behalf or the
15 Committee ever requested documents from the repository? You
16 said that you --

17 MR. MEEHAN: In this case, or ever?

18 THE COURT: Ever.

19 MR. MEEHAN: To my -- in this case, no. And to my
20 knowledge, no in any case.

21 THE COURT: Can you make that request? Can you make
22 that request in -- with respect to Mr. Cloud from the
23 repository?

24 MR. MEEHAN: Is Your Honor ordering us to do that?

25 THE COURT: No. I'm just asking the question.

1 MR. MEEHAN: We have not made that request, and we have
2 no plans to do so.

3 THE COURT: Okay.

4 MR. MEEHAN: And the Fifth Circuit again in *Vega* is
5 clear. We have no duty to -- to reach out, to identify
6 information from third-parties or to conduct --

7 THE COURT: What do you do in a situation where you got
8 a brain damaged, or very damaged -- physically damaged player
9 who is convinced, rightly or wrongly, that there's medical
10 records out there, who has repeatedly asked -- I'm just
11 assuming this is all true. I understand it may not be.
12 okay? -- who has asked everybody possible to give him the
13 medical records, franchises, the doctors, whatever? I mean, he
14 hadn't gotten them. And then he's not allowed to have that be
15 considered because he can't get it before the Plan, Committee,
16 or Board.

17 MR. MEEHAN: What --

18 THE COURT: What happens in a situation like that?
19 Just everybody shrugs their shoulders and say, well, he didn't
20 get it? We can't get it 'cause we're not going to ask the
21 repository. We're not going to ask -- I think there was a
22 document that one of your -- is it Mr. Junk?

23 MR. MEEHAN: Yes, Michael Junk.

24 THE COURT: That he filed that says, you know, what are
25 we? We're not -- they might have something in the franchises,

1 but that's not us.

2 So what is a player to do if there's medical
3 records directly on point? I'm not saying in this case that
4 there is 'cause you -- that's -- that's a disputed item right
5 now, according to you. One side is saying -- the Plaintiff is
6 saying that there's at least the impact exam from 2005 that
7 he's been trying to get that still can't get, and you got
8 serious doubt whether it even exist. That's what you told the
9 Court.

10 MR. MEEHAN: May I explain why?

11 THE COURT: No. I'm getting to a question here. So
12 what's a player to do in a situation like that?

13 MR. MEEHAN: Well, if Your Honor can forgive me,
14 then -- I'm reluctant to advise someone else who's not my
15 client, but I will say in the abstract.

16 THE COURT: In the abstract.

17 MR. MEEHAN: Okay. Efforts were made, was what we
18 heard today, to get it from the Patriots. Rule 45, Federal
19 Rules of Civil Procedure has a mechanism to issue a subpoena in
20 a lawsuit that exist. We have not seen a subpoena.

21 THE COURT: Oh, you mean in this case?

22 MR. MEEHAN: In this case.

23 THE COURT: But I'm talking about -- my question -- I'm
24 sorry. I was talking about before the Committee or the Board.

25 MR. MEEHAN: What -- what the Committee, the Board, the

1 Plan overall does is to implement the terms of the plan. So --
2 so there are ways to advise players that if they believe there
3 are team records -- I believe each of the witnesses testified
4 to this effect -- that they can go to the head trainer of their
5 last team who should have whatever records are available. So
6 in this instance, Mr. Cloud could have gone to the Giants.

7 THE COURT: But the Plan makes no -- I know you said
8 that they have no duty, but the Plan has not made -- cannot and
9 does not make any effort to facilitate that?

10 MR. MEEHAN: Getting the --

11 THE COURT: Getting it from franchises?

12 MR. MEEHAN: Correct.

13 THE COURT: Okay.

14 MR. MEEHAN: Because if the Plan does that for one
15 individual and not for the next individual, the second
16 individual that claim that he or she was somehow treated
17 differently, and so that --

18 THE COURT: Which is why I'm asking if you've ever done
19 that before, and your answer is no, right?

20 MR. MEEHAN: My answer is no. I believe it's never
21 been done.

22 THE COURT: Okay.

23 MR. MEEHAN: But that's my understanding.

24 And so, Your Honor, director reports and
25 counsel reports, speak briefly about those. The director

1 reports, each of the witnesses refer to them when they were
2 asked questions along the lines of how many players are in this
3 category of active football, how many players are in the
4 category of inactive A, which is where Mr. Cloud currently is.
5 So both are totally and permanently disabled, but the -- the
6 levels of compensation are different and the criteria for each
7 are different.

8 The witnesses through the 30(b)(6) where I,
9 among others, educated Mr. Vincent over the space of many, many
10 hours in multiple days about facts so that he could be able to
11 testify. And, yes, we put together a -- a thick notebook with
12 everything that we thought would be useful to him to provide
13 all of that information. And we gave a copy to counsel so he'd
14 have all of that which --

15 THE COURT: I don't have a problem with that.

16 MR. MEEHAN: Okay. Thank you, Your Honor. 'Cause we
17 did that to try to make sure he was fully informed as best we
18 could.

19 But the director's reports came up because when
20 they were asked about, well, how many claims do you get and how
21 many are approved, how many are denied, questions to that
22 nature, the witnesses were, obviously, not able to off the top
23 of their heads. We prepped them only for the current period
24 'cause there were topics in the -- in the 51 in the 30(b)(6)
25 that talk about the present tense. How many are in this

1 category, how many are in that category. But then when the
2 questions became historical, what about 2016, what about 2012,
3 things of that nature, the witnesses says, of course, I don't
4 know because we didn't prep them on that.

5 So they mention director reports have those
6 statistics. What we did today is we excerpted those pages from
7 the director's reports going back to 2014, which is when the
8 initial application here was -- was submitted, and we provided
9 those to counsel. So they come from the director's reports.
10 All those statistics are there.

11 The counsel reports do not contain statistics.
12 The witnesses explained that in addition to director reports,
13 there are counsel reports. Those go to matters in litigation,
14 by and large, and the fiduciary exceptions does not apply
15 there. The firm is providing legal advice on matters in
16 litigation, by and large. Those counsel reports, we believe,
17 are privileged and do not speak to the statistical issues that
18 the Plaintiff was asking about, so we don't think they are
19 relevant just because the witness mention that this is one of
20 the ways in which the law firm provides advice to the Committee
21 or the Board.

22 The queries of the database -- there is a
23 database which Mr. Vincent spoke about. And he was a little
24 unclear on exactly how long it had been in existence and how
25 broad the information. Queries of sorts can be run. So if you

1 want to -- if you want to say, well, I want to know how many
2 claims there were in a particular year and how many were, you
3 know, denied or -- or approved, you can get a computer to
4 generate some numbers. But as I believe Mr. Vincent explained,
5 a human being needs to go through all of those and figure out,
6 well, were they total and permanent? Which -- which
7 classification? Are any of them inactive A or active football?
8 Which are the two at issue here. And so I believe Mr. Vincent
9 made clear that this was a multiday exercise.

10 It's never been made clear to us how any of
11 that information could possibly be of value. So we are
12 concerned about doing, basically, a search for a needle in a
13 haystack. If the issue is very broadly put, well, somehow Mr.
14 Cloud was discriminated against, well, Your Honor will see in
15 some of the e-mail traffic, which is a bit of the iceberg
16 between us, where I was only saying, well, the only thing I
17 heard --

18 THE COURT: I don't have the e-mail traffic, right?

19 MR. MEEHAN: Yes. Some e-mail traffic is attached to
20 our appendix to our opposition.

21 THE COURT: Some of it. I know that you have continued
22 to work with each other, which is a good thing.

23 MR. MEEHAN: Right. We have tried.

24 THE COURT: All right. Continue.

25 MR. MEEHAN: So, Your Honor, what -- what I'm getting

1 at is in that e-mail traffic, which is attached to the
2 opposition, you'll see I raised the point that in the
3 depositions the only issue at one point where I thought counsel
4 was suggesting there were some discrimination was he was asking
5 witnesses questions, do you know Mr. Cloud's ethnicity. And so
6 I -- I asked him. I said, Well, are you suggesting there were
7 some sort of racial discrimination? Is that what you're
8 suggesting?

9 And I didn't get a clear answer, but I surmised
10 that that was not it. And all the conversations we had went
11 more to, well, it's arbitrary and capricious. But what does
12 that mean here.

13 There are approximately, as I understand it, a
14 thousand claims every year now, and the Board reviews hundreds
15 of these claims every year. So are we to now go back over 5,
16 6, 10, 12 years and pull every claim and determine was it
17 approved, was it denied and -- and do what? Synthesize those
18 or produce thousands of pages of medical records, extracting
19 all the names and saying -

20 THE COURT: Well --

21 MR. MEEHAN: What I'm getting at is, where does this
22 go?

23 THE COURT: Just to -- just to save time. The Court is
24 not inclined -- I am focusing on this Plaintiff in this case.
25 And I think there was discussion in the papers about -- I think

1 it was in the context of arbitrary and capricious and, you
2 know, being able to do discovery to see if there should be a
3 motion for leave to amend pleadings. And at this time I'm not
4 really sympathetic to that argument. I'm using the word
5 "sympathetic" in quotes there. That sounds like beyond where
6 discovery should go.

7 So if you want to quit while you're ahead on
8 that, you need to move on.

9 MR. MEEHAN: Thank you for your guidance, Your Honor.
10 Yes, on that particular point.

11 The reference to medical records that may be
12 outstanding, the Plan has none. Dr. Canizares, the issue
13 with -- with him -- and, again, Mr. Vincent testified about
14 this, is...

15 THE COURT: As an officer of the Court --

16 MR. MEEHAN: Yes.

17 THE COURT: -- you're stating right now the Plan has no
18 medical records that you haven't already produced in connection
19 with this litigation on Michael Cloud to the Plaintiff's
20 lawyer, period?

21 MR. MEEHAN: Correct. Period.

22 THE COURT: Okay. And that the Plan has no documents
23 that it can access or have a superior right of control on
24 Michael Cloud?

25 MR. MEEHAN: Yes.

1 THE COURT: Okay.

2 MR. MEEHAN: Including, but not limited to, this
3 medical repository or any impact study that the Patriots did.

4 THE COURT: All right. So you are representing in
5 court today you absolutely have given over every single medical
6 record that the Plan has or can access with respect to Michael
7 Cloud?

8 MR. MEEHAN: I have been so assured repeatedly. Yes,
9 Your Honor.

10 THE COURT: Okay. That's what I need to know.

11 MR. MEEHAN: Yes. Briefly --

12 THE COURT: And --

13 MR. MEEHAN: Sorry.

14 THE COURT: Let me ask you to finalize that topic. Has
15 there ever been -- you're an officer of the court and I take
16 your word for it, period. But you also said, I've been
17 repeatedly assured of that. Will you check into whether or not
18 you can file an affidavit by somebody whose job it was to look
19 for that and say we have looked for any and all medical records
20 in our possession, custody, or control? You can look at the
21 rules of what's required. And I think that means also any kind
22 of right to compel. You put that in an affidavit and file it
23 as a supplement to your response, which you have leave to do
24 right now --

25 MR. MEEHAN: Yes, Your Honor.

1 THE COURT: -- to the motion to compel. I think
2 that'll put an end to one line of questions and inquiry and
3 something I was curious about.

4 MR. MEEHAN: Yes, Your Honor. I will --

5 THE COURT: I know you can look into it and you can't
6 make the representation, but the Court would find that very
7 helpful.

8 MR. MEEHAN: And, Your Honor, thank you for that
9 opportunity. I'd be happy to do it. I would just note
10 briefly, Document 36, which was filed July 20 of '21, is a
11 declaration of Mr. Vincent which I believe goes to those
12 points, but I'll look at it with more care to see if there's
13 anything that we --

14 THE COURT: Was that before or after the deposition?

15 MR. MEEHAN: Before the deposition.

16 THE COURT: Okay. I think it's a very cloudy area
17 right now. So an affidavit or something -- or the person whose
18 job it was to look for it, signing off on it, I think that
19 would be helpful.

20 MR. MEEHAN: Yes, Your Honor. We -- we will --

21 THE COURT: Okay.

22 MR. MEEHAN: -- be happy to do it. Your Honor, from
23 a --

24 THE COURT: Continue.

25 MR. MEEHAN: I suspect we'll get to time periods for

1 followup papers, so I'll leave that for the moment to decide.

2 THE COURT: Yes.

3 MR. MEEHAN: The impact study. If I may, this is --
4 this is one of the reasons why I think it's very, very
5 important.

6 THE COURT: You talk about the impact exam?

7 MR. MEEHAN: Oh. Impact exam. I guess sometimes it's
8 referred to as impact study, but impact exam.

9 THE COURT: You're talking about the one involving
10 Michael Cloud in 2005 by the Patriots, if it exists, right?
11 Okay.

12 MR. MEEHAN: Yes. Allegedly so.

13 THE COURT: Okay.

14 MR. MEEHAN: So -- and I only say that, you know, with
15 care. I'm not saying it didn't happen. I'm just saying we --
16 we are not conceding it did and --

17 THE COURT: I understand.

18 MR. MEEHAN: Okay. So the -- it's an example of why
19 it's so important to be specific rather than, you know, be
20 appalling and horrible and other such adjectives and to focus
21 very specifically on what's going on here, is from the player
22 records that are in the administrative record already. If you
23 look at the administrative record, you will see that the
24 complaint is wrong when it says Mr. Cloud played for the
25 Patriots in 2005 for three weeks. He played for them for six

1 weeks. Why is that important? Here's why.

2 He was with the Giants through the end of the
3 2004 season. He went to the Giants -- back to the Giants
4 May of 2005 when spring games began. Cut by the Giants,
5 September 4, 2005. Picked up by the Patriots, November 4,
6 2005.

7 And -- and I don't mean to belabor this, but
8 this really goes to the heart of the discovery issues, which is
9 November 4, 2005, is already 12 months after the 10-31-04
10 collision which is the basis of the complaint that supposedly
11 made Mr. Cloud experience all of his issues. And under the
12 plan, that shortly after definition, that's crystal clear. If
13 you're totally and permanently disabled as a result of and it
14 takes more than 12 months to manifest itself, the Plan cannot,
15 no matter how sympathetic your situation may be, cannot put you
16 on active football because it has to happen within 12 months.

17 So Plaintiff says, well, he was only with the
18 Patriots for three weeks, couldn't remember plays, and they cut
19 him after they did an impact exam. He stayed with the Patriots
20 until the 13th of December. He was cut twice. He was cut
21 after three weeks because they had other players in the depth
22 chart and they didn't wish to retain him. Two days later, they
23 brought him back because one of the guys they were counting on
24 got injured.

25 He stayed and he played through December 13th.

1 That would mean this impact exam had to have been conducted on
2 the 12th of December. Why do I say that? Because he played in
3 the game on December 11th. He's cut on December 13th. So if
4 the impact exam is December 12th and they conclude based on
5 that it's time to cut him, it doesn't add up. And then he's
6 later then picked up by the Giants on December 27th, I believe,
7 and plays on December 31. How that relates again? The shortly
8 after definition.

9 Regardless, the Plan does not contest Mr. Cloud
10 being disabled. The Plan accepted that because he qualified
11 because the Social Security Administration found him to be
12 disabled effective December 31, 2008.

13 So he meets inactive A. But no matter what --
14 we can argue about changed circumstances, we can argue about
15 anything. But shortly after is a black-and-white, brick wall
16 deadline of 12 months. And the complaint says October 31, '04
17 he was -- the helmet-to-helmet, you heard counsel talk about
18 it. And immediately thereafter, he's disabled and he couldn't
19 remember plays.

20 He plied his trade, was paid by two
21 professional football teams into the end of 2005. That's more
22 than 12 months later. And the Committee, when they were
23 deposed, ultimate -- and this is in the decision letter, same
24 thing in the Board. They ultimately said in addition to
25 everything else we have that's of concern, you cannot under any

1 definition meet shortly after.

2 And, Your Honor, there's one other issue that's
3 going on in this case that is ripe to discuss. Plaintiff is
4 now, through its amended -- its initial disclosures, and is
5 arguing an entirely new theory of -- of harm that supposedly
6 takes place after October 31st of 2004 and is seeking discovery
7 of all other issues that may relate to this later date. None
8 of that is in this case.

9 THE COURT: Okay.

10 MR. MEEHAN: So...

11 THE COURT: Anything else?

12 I'll tell you what, we've now gone two hours.
13 Why don't we all take a ten-minute break. You can both look
14 over your notes and decide if there's anything else that you
15 would like to present to the Court by way of oral argument when
16 we get back. If there -- and please don't be repetitive. And
17 try not to be. You know, I'm not going to make a decision
18 today. Okay?

19 And then, also, kind of crystallize in your
20 mind as to what it is that you would like the opportunity to
21 brief the Court further, which includes multiple references to
22 deposition transcripts. It's almost like the two of you were
23 at two different depositions, or shall we say six different
24 depositions.

25 So when I come back -- I'll give you an

1 opportunity to take your break. Right now it's 4:33. How
2 about a quarter to 5:00 we reconvene in here? You take your
3 breaks down the hall, get, in your mind, what else you want to
4 argue to the Court that's not already in the papers that you
5 haven't already argued, and then we'll wrap it up. Okay?

6 MR. MEEHAN: Thank you, Your Honor.

7 THE COURT: Let's take a brief recess.

8 SECURITY OFFICER: All rise.

9 (Court in recess.)

10 THE COURT: Counsel, we're back after our short break.

11 Mr. Meehan, anything further as far as argument
12 today?

13 MR. MEEHAN: No, Your Honor. Thank you very much.

14 THE COURT: Okay. Anything that you want to say in
15 reply to the response to argument today?

16 MR. DENNIE: Thank you, Your Honor. And I'll be very
17 brief.

18 THE COURT: Okay. Famous last words by lawyers. I'm
19 going to hold you to this. Let's do it.

20 MR. DENNIE: I'm going to do my best.

21 So at the very end of discussion there, there
22 was a conversation about the shortly after language.

23 THE COURT: The six weeks versus three weeks, that one?

24 MR. DENNIE: Well, it was actually after that, about
25 how there's no meeting of the definition of shortly after

1 because the injury occurred --

2 THE COURT: Okay.

3 MR. DENNIE: -- October 31st, 2004. And I just want to
4 be clear on something 'cause counsel asked -- we had this same
5 conversation last week, and I pointed him to the same thing
6 that I would point you-all to, Appendix 6, which is the
7 decision letter of the Board that we're talking about here
8 today, November 23rd, 2016. This is what the Groom law firm
9 wrote. As Mr. Meehan said, they wrote this.

10 "She stated that you 'became disabled' in 2005
11 while playing for the New York Giants due to cumulative mental
12 disorder."

13 So the point I'm trying to make here -- and I
14 know they were trying to argue the merits on that one, but this
15 is their own letter where we're saying the application
16 references 2005. And it is a circumstance where he had the
17 injury -- the basis, the underlying injury occurred in 2004,
18 October 31st. But he returned to play within 48 hours and
19 continued taking those hits which ultimately resulted in an
20 impact exam conducted by the New England Patriots. Whether
21 it's three weeks or four or five or six, it wasn't very long.
22 It was a very short period of time.

23 So my request on that issue, Your Honor, is if
24 that is not clear to the Court that we're making the comment
25 and statement that the injury, the main injury occurred on

1 the -- in 2004 but continue for multiple cumulative hits, that
2 we be permitted to amend on that issue.

3 THE COURT: Amend what?

4 MR. DENNIE: The complaint, to make it clear what we're
5 saying. I mean, it's all spelled out in the facts, but we want
6 to be able to make it clear --

7 THE COURT: Okay. Well...

8 MR. DENNIE: And we've been --

9 THE COURT: So you're essentially doing a motion for
10 leave to amend, and we'll take that up later. Anything further
11 with respect to the motion to compel?

12 MR. DENNIE: Okay. So the -- the other issue I wanted
13 to point out. There was a lot of discussion, Your Honor,
14 about, you know, blackletter law and the Fifth Circuit has said
15 this and you can't do anything more. I want to be clear, Your
16 Honor. As I pointed out earlier, you stuck pretty tight to the
17 language that appears in *Crosby* in your order to us on
18 July 22nd.

19 The *Vega* court discussed review of the
20 administrative record, review of how the administrator has
21 interpreted the plan in the past, and review of information
22 that would assist the Court in understanding medical terms and
23 information. That's what *Vega* said.

24 *Crosby* followed and expanded that because it
25 specifically says, quote, *Vega* does not, however, prohibit the

1 admission of evidence to resolve other questions that may be
2 raised in an ERISA action. And it goes on to say, quote, A
3 claimant may question the completeness of the administrative
4 record, one; two, whether the plan administrator complied with
5 ERISA procedural regulations; and, three, the existence and
6 extent of a conflict of interest created by a plan
7 administrator's dual role making benefits determinations and
8 funding the plan.

9 Then the case goes on and says we see no reason
10 to limit the admissibility of evidence on these matters to that
11 contained in the administrative record in part because we can
12 envision situations where evidence resolving these disputes may
13 not be contained in the administrative record.

14 It's essentially what your order says. So this
15 is not blackletter law, we're going to overturn you if you
16 grant the discovery that's being requested. The discovery here
17 is extremely important.

18 THE COURT: Okay. You're getting into argument. What
19 else?

20 MR. DENNIE: The only other thing I would add is --

21 THE COURT: I meant repetitive argument.

22 MR. DENNIE: Yeah. I won't belabor that point. The
23 only other thing that I wanted to address was the reference to
24 the database being thousands of claims per year. There are a
25 bunch of different types of claims that can be submitted.

1 Mr. Vincent specifically indicated he could run a query for
2 total and permanent disability, which is a much smaller
3 category.

4 We don't want to know if someone had a pension
5 issue or some other issue that presented to the Plan. We don't
6 care about that. We want to know the information on total and
7 permanent disability. That's what we want. That's where we
8 would get the information to help us understand if there was
9 inconsistency in the application, which is a component of
10 arbitrary and capriciousness and full and fair review. That's
11 what we're after in this case, nothing more, nothing less.

12 We just want the information so we can go after
13 those very standards that the Fifth Circuit has set out.

14 THE COURT: Okay. Anything else?

15 MR. DENNIE: That's it. Thank you.

16 THE COURT: Anything further in reply to the reply?

17 MR. MEEHAN: No, because I know we're going to have
18 that opportunity in the supplemental filing --

19 THE COURT: Yes, you will.

20 MR. MEEHAN: -- so I won't do that. I did have one
21 question.

22 THE COURT: Yes.

23 MR. MEEHAN: Perhaps the Court is following, but I now
24 understand from Plaintiff's counsel that this query they want
25 run of the database is limited to total and permanent

1 disability claims, but what does that mean? I'm not following.

2 We would generate a list, I guess names
3 redacted so we protect people's information and say there were
4 300 or 200 or 4 or 11,000 or whatever the number is. Is that
5 what we would be asked to do? And to -- to what end would that
6 help anyone?

7 MR. DENNIE: May I answer?

8 THE COURT: No. We're done. We're done with the
9 argument on the motion to compel. I'll go off the record and
10 bring up scheduling items.

11 Let's go off the record.

12 (Off the record.)

13 THE COURT: Let's go back on the record.

14 Counsel, the Court will entertain supplemental
15 briefing on the issue of the motion to compel and some issues
16 that were raised during this hearing and some not. But what
17 the Court is particularly interested in is as follows: I would
18 like each side to address the exceptions to allow discovery in
19 ERISA case under -- the two exceptions under *Vega* and the three
20 in *Crosby*. From the Plaintiff's side, obviously, you touched
21 on at the very end what would allow discovery and what that is.
22 And on the Plan side, why none of the exceptions articulated in
23 *Vega* and *Crosby* apply here. Okay?

24 Also, with respect to the Plaintiff, the Court
25 would ask you to identify with specificity the procedural --

1 ERISA procedural regulations that you claim were not complied
2 with, with specificity.

3 In addition, both sides today referenced
4 depositions that were recently taken and transcripts that were
5 received even more recently. Some of this was set forth and
6 attached to the reply. And, quite frankly, the Court has no
7 intention to read 9,000 pages of depositions; however, probably
8 should get -- we'll discuss format later -- an actual set of
9 the deposition. So not that I want to double-check everything
10 that you say, but I will.

11 If you're using portions of the deposition to
12 support or respond to what was said during this hearing
13 relative to the motion to compel -- because I think it's tied
14 to the -- a lot of the motion to compel, which was filed after
15 the three depositions were taken, were in response to answers
16 that were received or not received, allegedly, in connection
17 with the depositions.

18 So if you could be very specific, build it into
19 your pleading and provide the Court -- you can decide between
20 the two of you, you know, providing the Court with a copy that
21 we can search. But when you are saying that a certain
22 deposition supports your position, identify it by page, line or
23 whatever to make it easily searchable by the Court and quote
24 from it. Okay?

25 Those are the areas that I would like

1 supplemental briefing on.

2 Let's go off the record.

3 (Off the record.)

4 THE COURT: Let's go back on the record.

5 So with respect to the supplemental briefing,
6 you-all can submit, if you choose, if there's anything more
7 that you like the Court to consider. Supplemental briefing, we
8 discussed maybe an affidavit, all that can be by Friday, the
9 10th of September. The sooner the better but that's the
10 deadline.

11 Off the record.

12 (Off the record.)

13 THE COURT: Let's go on the record.

14 Counsel, with respect to the current scheduling
15 order on this case, which sets trial on December 8th, is it, or
16 6th?

17 MR. DENNIE: The three-week docket starts on the 6th.

18 THE COURT: You will not be reached at that time.

19 Let's go off the record.

20 (Off the record.)

21 THE COURT: On the record.

22 The Court is aware that a motion for summary
23 judgment has been filed on behalf of the Defendant. The
24 response time will be the three weeks from the date it was
25 filed is set aside. And, again, a new deadline will be set

1 forth on that by the Court. It'll be a minimum of three weeks
2 after the Court rules on this, but it may be longer. All
3 right? So as far as responsive documents to the summary
4 judgment, that is a waste of time at this time. So that's on
5 the record.

6 MR. MEEHAN: Your Honor, may I?

7 THE COURT: On record?

8 MR. MEEHAN: Yes.

9 THE COURT: Go ahead.

10 MR. MEEHAN: We're on the record, yes?

11 THE COURT: Yes.

12 MR. MEEHAN: May I -- I think I appreciate where the
13 Court is going, and I think I'm following it. But it would be
14 helpful, I suggest, in the context of determining what, if any,
15 discovery the Court believes should go forward, both to
16 consider this concept of the exceptions in the Fifth Circuit
17 and whether any apply but also whether any is needed under
18 Rule 56 to address summary judgment. Because even --

19 THE COURT: So what are you asking me?

20 MR. MEEHAN: Well, what -- I guess what I'm asking is
21 that -- is that rather than suspend the time to respond to
22 summary judgment, that a date be placed for a response. And as
23 part of the response, Plaintiff can identify that --

24 THE COURT: No, I'm not inclined to do that.

25 MR. MEEHAN: Okay.

1 THE COURT: I'm going to stick with what I said.

2 MR. MEEHAN: Okay. I just wanted to raise the Rule 56
3 procedure, but I understand that the Court is not going --

4 THE COURT: No. The Plaintiff either on the record, I
5 believe you did, but it might have been off the record, moved
6 orally for extended time to file a response to the motion for
7 summary judgment, and that oral motion is granted.

8 As far as the deadline, the Court will get back
9 to you with a deadline after the Court makes a ruling on this
10 discovery. But it will be no sooner than three weeks after the
11 Court makes a ruling, but it could be longer.

12 Off the record.

13 (Off the record.)

14 THE COURT: Back on the record.

15 Since the trial date is lifted, there are
16 deadlines that we discussed earlier. Obviously, deadlines for
17 pretrial material, close of discovery, possibly supplementing
18 the administrative record and so on, these will be revisited
19 after the Court decides the matter before the Court. So we've
20 got a little bit of work to do. You-all have about two and a
21 half weeks to do it and then it will get in line with
22 everything else the Court has on its plate. I hope to get to
23 it soon, but we'll see. Okay?

24 Off the record.

25 (Off the record.)

1 THE COURT: On the record.

2 If counsel for Defendant finds, in light of
3 what is before the Court right now and discovery that was had
4 and for any reason that counsel would like to have a new
5 summary judgment, amended summary judgment, leave is granted
6 right now for that.

7 And so everything's lifted right now. So we
8 have a pending motion for summary judgment. There's no
9 deadline yet because there's homework assignments for you-all,
10 and then I'll have a homework assignment. The Court will
11 either go ahead and put it back on the schedule -- and you can
12 stand by your original motion for summary judgment, or you have
13 leave to file a new summary judgment. You can get back to us
14 how much time you need on that.

15 MR. MEEHAN: Okay.

16 THE COURT: Leave is granted --

17 MR. MEEHAN: Thank you, Your Honor.

18 THE COURT: -- if that happens.

19 MR. MEEHAN: Thank you, Your Honor.

20 THE COURT: Off the record.

21 (Off the record.)

22 THE COURT: Back on the record.

23 It's the Court's anticipation that we'll be
24 issuing a brand-new scheduling order with input from the
25 lawyers once we get past this discovery issue, or set of

1 issues. Everybody understand?

2 MR. DENNIE: Yes, Your Honor.

3 MR. MEEHAN: Yes, Your Honor.

4 THE COURT: Off the record.

5 (Off the record.)

6 THE COURT: Counsel, is there anything else that you
7 would like to say or need to say on the record on behalf of
8 your client? Plaintiff?

9 MR. DENNIE: No, Your Honor. Thank you for your time.

10 THE COURT: On behalf of the Plan?

11 MR. MEEHAN: No, Your Honor. Thank you.

12 THE COURT: If you want to talk to my court reporter
13 about transcript for today, she's here; otherwise, you-all stay
14 safe and we'll see you next time.

15 SECURITY OFFICER: All rise.

16 (WHEREUPON, the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Thu Bui, CRR, RMR, Official Court Reporter,
United States District Court, Northern District of Texas, do
hereby certify that the foregoing is a true and correct
transcript, to the best of my ability and understanding, from
the record of the proceedings in the above-entitled and
numbered matter.

/s/ Thu Bui
Official Court Reporter

APPENDIX 2

<p>11 Q What time period did you serve on the 12 committee? 13 A I have served on the committee since 14 its inception, which I believe was in 2006. And I 15 still serve on the committee. 16 Q So you served on the committee from 17 2006 to the present. Is that correct? 18 A Correct. 19 Q Do you know on a statistical basis 20 how many disability claims have been granted versus 21 denied? 22 A I do not.</p> <p style="text-align: right;">Page 26</p>	<p>15 Q Okay. So if I was trying to 16 determine when benefits were provided and that case 17 granted or denied, where would I find that 18 information? 19 A You'd probably find that from the 20 Plan Benefit Office. 21 Q Okay. Yesterday there was some 22 testimony about quarterly reports prepared by the</p> <p style="text-align: right;">Page 28</p>
<p>?</p> <p style="text-align: right;">Page 27</p>	<p>1 claim benefits office? 2 A Yes, for the retirement board meeting 3 purposes. 4 Q Have you seen those records? 5 A Yes. 6 Q In your experience, are they prepared 7 every quarter? 8 A Yes. 9 Q So that's something that the Plan can 10 get its hands on pretty easy I would think, 11 correct? 12 A I would think so.</p> <p>17 How do you receive documentation for 18 board meetings? 19 A They are included in the counsel 20 report. 21 Q Okay. Tell me what a counsel report 22 is.</p> <p style="text-align: right;">Page 29</p>

<p>1 A The counsel report is the information</p> <p>2 that Groom Law Group compiles for the retirement</p> <p>3 board meeting.</p> <p>4 Q So the quarterly report, is that an</p> <p>5 attachment to the counsel report?</p> <p>6 A It is in the counsel report -- a part</p> <p>7 of the counsel report.</p> <p>8 Q And I just want to be clear on how it</p> <p>9 gets there. So you're familiar with the Plan or</p> <p>10 the retirement board -- let me do that another way.</p> <p>11 So you're familiar with the</p> <p>12 retirement board -- let me do that again. Today, I</p> <p>13 can't talk. It's something about the air.</p> <p>14 You're familiar that the retirement</p> <p>15 board compiles statistical information on whether</p> <p>16 claims are granted or denied, correct?</p> <p>17 A The Claim Benefit Office compiles</p> <p>18 that information.</p> <p>19 Q What did I say? I said the</p> <p>20 retirement board?</p> <p>21 A Yeah, you did.</p> <p>22 Q Okay. I'm sorry.</p> <p style="text-align: right;">Page 30</p>	<p style="text-align: right;">Page 32</p>
<p>1 The Plan Benefit Office compiles</p> <p>2 granted versus denied disability applications,</p> <p>3 correct?</p> <p>4 A Yes.</p> <p>5 Q And that's a document that we should</p> <p>6 be able to get our hands on pretty easily, correct?</p> <p>7 A I would think so.</p> <p>8 Q As it relates to funding of the Plan,</p> <p>9 are there documentation, records, that you have</p> <p>10 seen that indicates how much funding goes out on a</p> <p>11 quarterly basis?</p> <p>12 A I believe that is in the counsel</p> <p>13 report as well.</p> <p>14 Q So that's also information that's</p> <p>15 compiled by the retirement -- excuse me. Let me</p> <p>16 ask it again.</p> <p>17 That's also information that's</p> <p>18 retirement -- that's also information that's</p> <p>19 compiled by the Benefits Office, correct?</p> <p>20 A Yes.</p> <p style="text-align: right;">Page 31</p>	<p>8 Are you saying the information that</p> <p>9 we just talked about, the granting or denial of</p> <p>10 benefits claims, the funding of claims, that's not</p> <p>11 in the counsel report, but it's in a director's</p> <p>12 report?</p> <p>13 Is that what you're saying?</p> <p>14 A Correct.</p> <p>18 Q Okay. When you say director's</p> <p>19 report, what director are you referencing?</p> <p>20 A The Plan director.</p> <p style="text-align: right;">Page 33</p>

<p>12 MR. DENNIE: So I'm going to again 13 request that those reports be provided. I 14 requested it yesterday. There are multiple 15 requests for production that have asked for records 16 similar to that, and I believe that was 37, 57, 58, 17 there's probably more. When are we going to get 18 those documents? We requested those probably nine 19 months ago. 20 MR. MEEHAN: If you're directing that 21 to me, you know, send me a request. 22 MR. DENNIE: We did nine months ago. Page 34</p>	<p>1 focused on the deposition today. I'll respond to 2 you as soon as possible. 7 BY MR. DENNIE: 8 Q So I want to be clear, I can't ask 9 you too many questions about documents I've never 10 seen, but you and the witness yesterday both 11 confirmed that there are records that discuss the 12 funding of the Plan and whether benefits were 13 granted or denied. And you said they're in a 14 director's report, correct? 15 A To the best of my knowledge, yes. 16 Q Are you aware of what the contents of 17 those director's reports say? 18 Let's start with the last quarterly 19 report that you indicated probably would be in 20 February of this year? 21 A No, I don't remember. 22 Q Do you remember the contents of the Page 36</p>
<p>1 MR. MEEHAN: Well, send me a request 2 now telling me what you want and why you think 3 you're entitled to it. And like I said yesterday, 4 we'll take it under advisement and we'll get right 5 back to you. I want to make sure I know exactly 6 what you want, so if you can put it in writing so 7 there's no confusion. 8 MR. DENNIE: Well, just to be clear, 9 we're already on the record. So we're asking for 10 the director's report, the quarterly reports that 11 have been testified to by both of the witnesses 12 that have been withheld that were requested in our 13 first request for production many, many months ago. 14 And discovery is running out and now I'm deposing 15 witnesses and I don't have these report documents. 16 When can I get those? 17 I know you're new to the case, you 18 probably didn't handle that, but your colleague 19 has been in the whole time, so I need to know 20 when we can have them. Can we have them today? 21 MR. MEEHAN: I need you to send me a 22 written request on exactly what you want. I'm Page 35</p>	<p>1 director's report for any quarter prior to the last 2 report that you reviewed? 3 A I don't remember. 4 Q The only way that I'm going to be 5 able to determine what's in those records is by 6 getting the records, because neither you or 7 Mr. Reynolds recalled the contents of the report, 8 other than you know that there's discussion of 9 funding, and there's a discussion of granting and 10 denial of benefits. Is that right? 11 A Correct. 12 Q Do you know how many claims go to 13 appeal to the board on a percentage basis? 14 A I don't know. 15 Q Is that included within the 16 director's report? 17 A I would think so. 18 Q If I asked you the same questions 19 about whether you recall the contents of the 20 director's report related to appeals of disability 21 benefits applications, would you give me the same 22 answer, that you don't recall the contents of any Page 37</p>

<p>1 Q So is it fair to say you were not 2 present in person or by phone on the November 15th, 3 16th, 2016 meeting? 4 A That is correct.</p>	<p>15 You indicated that the board decided 16 Mr. Cloud's appeal, his request for 17 reclassification, correct? 18 A Correct. 19 Q The members on the board who made 20 that decision were Katie Blackburn, Dick Cass, Ted 21 Philips, Sam McCullum, Jeff Van Note, and Robert 22 Smith, correct?</p>

<p>1 A Correct.</p> <p>2 Q If I wanted to know how the board</p> <p>3 members arrived at their decision to deny</p> <p>4 Mr. Cloud's appeal, I would need to talk to them</p> <p>5 individually, correct?</p> <p>6 MR. MEEHAN: Objection. Calls for a</p> <p>7 legal conclusion.</p> <p>8 But go ahead and give your answer,</p> <p>9 ma'am.</p> <p>10 THE WITNESS: Yes.</p> <p>Page 174</p>	<p>1</p> <p>20 So on the NFLPA side, the</p> <p>21 representatives, you indicated that Bethany</p> <p>22 Marshall, Miki Yaras-Davis, and the Groom Law Firm</p> <p>Page 176</p>
<p>?</p> <p>Page 175</p>	<p>1 was there representing the Players Association. Is</p> <p>2 that correct?</p> <p>3 A Correct.</p> <p>4 Q And for the Groom Law Firm you</p> <p>5 indicated that Alvaro Anillo, Doug Ell, Mike Junk,</p> <p>6 Mike Maricco were there from the Groom Law Firm,</p> <p>7 correct?</p> <p>8 A Maricco. Correct.</p> <p>9 Q Mike Maricco?</p> <p>10 A Maricco, yeah.</p> <p>11 Q Do the individuals who you listed</p> <p>12 from the Groom Law Firm also advise the committee?</p> <p>13 A Alvaro Anillo would be our adviser</p> <p>14 for the most part.</p> <p>Page 177</p>

45 (Pages 174 - 177)

	<p>5 As it pertains to Mr. Cloud's 2016</p> <p>6 reclassification benefits, did you write the</p> <p>7 decision letter in that case?</p> <p>8 A I did not.</p> <p>9 Q As it pertains to Mr. Cloud's 2016</p> <p>10 reclassification for benefits application, did you</p> <p>11 review a decision letter before it was sent out?</p> <p>12 A Not that I recall.</p> <p>13 Q As it pertains to Mr. Cloud's 2016</p> <p>14 reclassification for disability benefits</p> <p>15 application, did you review the decision letter and</p> <p>16 make any changes to it before it was sent out?</p> <p>17 A Not that I recall.</p> <p style="text-align: right;">?</p> <p style="text-align: right;">Page 200</p>
<p>3 Q Have you ever written a decision</p> <p>4 letter?</p> <p>5 A No.</p> <p>6 Q Do you review the decision letter</p> <p>7 before it goes out?</p> <p>8 A No.</p> <p>9 Q Have you ever made any changes to a</p> <p>10 decision letter before it goes out?</p> <p>11 A Not that I recall.</p> <p>20 Q Did you write the letter on</p> <p>21 Mr. Cloud's 2014 T&P benefits application?</p> <p>22 A I did not.</p> <p style="text-align: right;">Page 199</p>	<p style="text-align: right;">Page 201</p>

<p>4 Q Is changed circumstances defined in</p> <p>5 the Plan?</p> <p>6 A No.</p> <p>7</p> <p>21 Q So do you want to change your answer</p> <p>22 on who came up with the definition of changed</p> <p>Page 266</p>	<p>1</p> <p>5 Q In your approximately 15 years on the</p> <p>6 committee, how many reclassification decisions have</p> <p>7 you been a part of?</p> <p>8 A Maybe between 10 and 15.</p> <p>9 Q And in the 10 or 15 reclassification</p> <p>10 decisions that you have been a part of, have you</p> <p>11 had to determine what changed circumstances means</p> <p>12 in all 10 or 15 of those cases?</p> <p>13 A Yes.</p> <p>14 Q What do you think it means?</p> <p>15 A It means a new or different injury or</p> <p>16 illness or impairment.</p> <p>Page 268</p>
<p>1 circumstances?</p> <p>2 A Yes, as a matter of fact I do. I</p> <p>3 don't know who came up with the definition.</p> <p>4</p> <p>Page 267</p>	<p>Page 269</p>

7 THE WITNESS: I agree that a new
8 impairment can include a concussion symptom, yeah.

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Page 272

8 Q Okay. Correct me if I'm wrong,
9 earlier you testified that as it pertains to
10 Mr. Cloud's 2016 reclassification decision letter,
11 you didn't read it before it went out, correct?

12 A That is correct.

16 Q So you certainly didn't tell anyone,
17 "This is what the definition of changed
18 circumstance that I want to include in this
19 decision letter," correct?

20 A Correct.

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14 Q Have you ever asked anyone to define
15 for you what changed circumstances means?

16 A Not that I recall.

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69 (Pages 270 - 273)

<p>22 Q Is clear and convincing defined</p> <p style="text-align: right;">Page 274</p>	<p>1 that there be a logical definition of clear and</p> <p>2 convincing that you would apply to every case?</p> <p>3 A Yes, it would be helpful.</p> <p>4 Q Because you want uniform consistency</p> <p>5 on the way that disability benefits applications</p> <p>6 are being decided, correct?</p> <p>7 A It would definitely be helpful.</p> <p>14 Q You would agree it's important for</p> <p>15 players to understand that there's uniformity in</p> <p>16 the way things are being applied across the board</p> <p>17 in disabled cases, correct?</p> <p>18 A I would agree with that, yeah.</p> <p style="text-align: right;">Page 276</p>
<p>1 anywhere in the Plan?</p> <p>2 A No.</p> <p>3 Q Has anyone told you what clear and</p> <p>4 convincing means?</p> <p>5 A Not that I recall.</p> <p>9 Q Have you come up with your own</p> <p>10 definition of what clear and convincing means?</p> <p>11 A I'm not sure.</p> <p>21 Q Don't you think it's important if</p> <p>22 you're trying to apply a set of facts to the Plan,</p> <p style="text-align: right;">Page 275</p>	<p>?</p> <p style="text-align: right;">Page 277</p>

<p>12 Q Under "Disabilities and Causes" that</p> <p>13 starts on CLOUD-AR-290, it lists migraines,</p> <p>14 clinical depression, significant memory and</p> <p>15 attention problems, vertigo, impaired verbal</p> <p>16 fluency. Then we flip over to the continuation, it</p> <p>17 says, migraines, clinical depression, memory loss,</p> <p>18 attention and decision problems, impaired verbal</p> <p>19 fluency, post-concussion syndrome, vertigo,</p> <p>20 affective disorder. Do you see that?</p> <p>21 A I do.</p> <p>22 Q Do you agree that there are new</p> <p style="text-align: right;">Page 330</p>	<p>1 Mr. Cloud's request for reclassification, right?</p> <p>2 A Correct.</p> <p>3 Q And it was your job to apply the</p> <p>4 terms of the Plan to Mr. Cloud's request, right?</p> <p>5 A Correct.</p> <p>6 Q We've listed off three new symptoms</p> <p>7 of concussions that you have agreed are new,</p> <p>8 correct?</p> <p>9 A Correct.</p> <p>10 Q Those new concussion symptoms equal a</p> <p>11 changed circumstance as set forth in the Plan,</p> <p>12 correct?</p> <p>13 MR. MEEHAN: Same objection.</p> <p>14 Go ahead.</p> <p>15 THE WITNESS: It looks that way,</p> <p>16 correct.</p> <p>17 BY MR. DENNIE:</p> <p>18 Q I'm going to go back to what I asked</p> <p>19 you earlier. After reviewing all of this</p> <p>20 information, listening to Mr. Reynolds testify,</p> <p>21 listening to Mr. Cloud talk, and answering</p> <p>22 questions all day, do you now believe that</p> <p style="text-align: right;">Page 332</p>
<p>1 concussion symptoms listed on Exhibit 5?</p> <p>2 A There are.</p> <p>3 Q Those include; affective disorder,</p> <p>4 attention and decision problems, and significant</p> <p>5 memory and attention problems, correct?</p> <p>6 A Correct.</p> <p>9 You testified earlier that a new</p> <p>10 concussion symptom can qualify as a changed</p> <p>11 circumstance, correct?</p> <p>12 A Correct.</p> <p style="text-align: right;">Page 331</p>	<p>1 Mr. Cloud did, in fact, qualify for</p> <p>2 reclassification in 2016?</p> <p>3 MR. MEEHAN: Objection. Asked and</p> <p>4 answered. And Mr. Cloud's remarks are not on the</p> <p>5 record, so -- they have been described to some</p> <p>6 extent on the record, but they are not part of the</p> <p>7 record.</p> <p>8 So go ahead, please.</p> <p>9 THE WITNESS: I believe that these</p> <p>10 new symptoms could have been changed circumstances.</p> <p style="text-align: right;">Page 333</p>

<p>22</p>	<p>1 answered.</p> <p>2 Go ahead.</p> <p>3 THE WITNESS: I think I agree that</p> <p>4 they can be changed circumstances.</p> <p>9 Q You actually agree that they are</p> <p>10 changed circumstances?</p> <p>11 MR. MEEHAN: Objection to the form.</p> <p>12 Go ahead.</p> <p>13 THE WITNESS: They are changes to his</p> <p>14 original application, yes.</p> <p>15 BY MR. DENNIE:</p> <p>Page 334</p>
<p>19 Q You also agreed that his new</p> <p>20 concussion symptoms are changed circumstances,</p> <p>21 right?</p> <p>22 MR. MEEHAN: Objection. Asked and</p>	<p>1 BY MR. DENNIE:</p> <p>2 Q You would agree that these changed</p> <p>3 symptoms are a changed circumstance as set forth in</p> <p>4 5.7(b) of Exhibit 1, wouldn't you?</p> <p>5 A Yes, they are changed circumstances.</p> <p>6</p> <p>9 To be clear, you denied Mr. Cloud's</p> <p>10 application for reclassification, correct?</p> <p>11 A Correct.</p> <p>12 Q Did you write the reclassification</p> <p>13 decision of Mr. Cloud?</p> <p>14 A You mean the letter?</p> <p>15 Q Correct.</p> <p>16 A No, I did not.</p> <p>17 Q Did you review your reclassification</p> <p>18 decision for Mr. Cloud before it went out?</p> <p>19 A Not that I recall.</p> <p>20 Q Did you talk to anyone about the</p> <p>21 reclassification decision before it went out?</p> <p>22 A Not that I recall.</p> <p>Page 335</p>

<p>9 Q Is CLOUD-AR-478 through CLOUD-AR-482 10 as shown in Exhibit 7, the decision rendered by the 11 committee on Mr. Cloud's reclassification 12 application? 13 A Yes.</p> <p>18 Q This letter was written by someone, 19 but they never talked to you about what to put in 20 the letter, did they? 21 A Not that I recall. 22 Q So their deposition of changed</p> <p style="text-align: right;">Page 338</p>	<p>1 A I don't know who, but someone here at 2 Groom. 3</p> <p style="text-align: right;">Page 340</p>
<p>5 Q So whoever wrote this came up with 6 their own definition of changed circumstance was 7 not approved by you, correct? 8 A I don't recall talking to anyone 9 about the wording of the letter. 10 Q And just to be clear, I asked you a 11 little bit different question. 12 You didn't approve their definition 13 of changed circumstance. Is that right? 14 A Not that I recall. 15 Q You've seen legal letters before, 16 right? 17 A Yes. 18 Q You would agree this certainly 19 appears to be written by a lawyer, doesn't it? 20 A Yes. 21 Q And who would be the lawyer that 22 would write a letter on behalf of the committee?</p> <p style="text-align: right;">Page 339</p>	<p>1</p> <p style="text-align: right;">Page 341</p>

	<p>1</p> <p>21 Q It mentions on 1204, "Thank you! The</p> <p>22 case summaries that are missing for me are and</p> <p>Page 358 Page 360</p>
	<p>1 Michael Cloud" after the redaction. Do you see</p> <p>2 that?</p> <p>3 A Uh-huh. I do.</p> <p>4 Q Did the Groom Firm write up a memo</p> <p>5 analyzing Mr. Cloud's case?</p> <p>6 A They did case summaries. I'm pretty</p> <p>7 sure back then they had started doing the case</p> <p>8 summaries.</p> <p>9 Q Why do they do case summaries?</p> <p>10 A To summarize the cases for those that</p> <p>11 are reviewing it, to kind of give those of us who</p> <p>12 review it an idea of what we will find within the</p> <p>13 depths of the case, or the paperwork rather, the</p> <p>14 file, the administrative records.</p> <p>15 Q You would agree that it's important</p> <p>16 that you actually review the medical records, not</p> <p>17 the case summary, correct?</p> <p>18 A Yes.</p> <p>19 Q And you feel certain that you</p> <p>20 reviewed Mr. Cloud's entire file prior to comes to</p> <p>21 a decision?</p> <p>22 A I feel certain that I reviewed his</p> <p>Page 359 Page 361</p>

91 (Pages 358 - 361)

<p>1 file to the best of my ability. So I don't know if</p> <p>2 I ended up being distracted and put it down and</p> <p>3 didn't go back to it or skipped a page or two, but</p> <p>4 I feel certain that I did read most of it to the</p> <p>5 best of my ability.</p> <p>6 Q Do you ever recall a time where you</p> <p>7 just relied on the case summary and did not read</p> <p>8 the entire file?</p> <p>9 A I don't recall that.</p> <p>10 Q Could that have happened?</p> <p>11 A Anything can happen.</p> <p>12 Q You would agree it's important for</p> <p>13 you to read the entire case file to come to a</p> <p>14 decision, right?</p> <p>15 A I do agree, it is important.</p> <p>16 Q We talked about this earlier a little</p> <p>17 bit, it's extremely important for the player</p> <p>18 seeking benefits, right?</p> <p>19 A That is correct.</p> <p>20 Q And you hold the duty to the retired</p> <p>21 NFL players who are seeking benefits and you know</p> <p>22 that it's vastly important that you review the</p> <p style="text-align: right;">Page 362</p>	<p style="text-align: right;">Page 364</p>
<p>1 medical file in total before rendering a decision,</p> <p>2 right?</p> <p>3 A I do.</p> <p>4 Q But you would admit sometimes you may</p> <p>5 not read the entire file?</p> <p>6 A I'm human.</p> <p>7 Q Is that yes?</p> <p>8 A Like I said, anything can happen,</p> <p>9 so...</p> <p style="text-align: right;">Page 363</p>	<p>1</p> <p style="text-align: right;">Page 365</p>

ACKNOWLEDGEMENT OF
DEPONENT

I, CHRISTOPHINE SMITH, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

9.2.21

Date

Christophine Smith

CHRISTOPHINE SMITH

1 Michael Cloud vs. The Bert Bell/Pete Rozelle NFL
2 Player Retirement Plan

3 CHRISTOPHINE SMITH

4 INSTRUCTIONS TO THE WITNESS:

5 Please read your deposition over carefully and
6 make any necessary corrections. You should state
7 the reason in the appropriate space on the errata
8 sheet for any corrections that are made.

9 After doing so, please sign the errata sheet
10 and date it.

11 You are signing same subject to the changes you
12 have noted on the errata sheet, which will be
13 attached to your deposition.

14 It is imperative that you return the original
15 errata sheet to the deposing attorney within thirty
16 (30) days of receipt of the deposition transcript by
17 you. If you fail to do so, the deposition
18 transcript may be deemed to be accurate and may be
19 used in court.

20

21

22

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2 Washington, DC 20005
(202) 857-DEPO

3
4 E R R A T A S H E E T

5 Case Name: Michael Cloud vs. The Bert Bell/Pete
Rozelle NFL Player Retirement Plan

6
7 Witness Name: CHRISTOPHINE SMITH

8
9 Deposition Date: August 5, 2021

10
11 Page No. Line No. Change/Reason for Change

12 4:4-- "Josephine" should be "Christophine" / correcting name of deponent
13 12:13-- "Boswell, B-O-S-W-E-L-L" should be "Doswell, D-O-S-W-E-L-L" / correcting name of deponent
14 54:14-- "yet" should be "yesterday" / word correction
15 64:9-- "mine" should be "mind" / word correction
16 97:14-- "support" should be "report" / word correction
17 98:8-- "about playing" should be "about applying" / word correction
18 106:12-- "I not." should be "I am not." / missing word
19 107:16-- "up in" should be "of" / word correction
20 138:8-- "reading it" should be "reading about it" / missing word
21 186:11-- "that my knowledge" should be "to my knowledge" / word correction
22 203:5-- "credit seasons" should be "credited seasons" / word correction
203:13-- "disable" should be "disabled" / word correction
204:12-- "deem his" should be "deem him" / word correction
205:21-- "receiving his" should be "reviewing his" / word correction
290:16-- "they actually" should be "they've actually" / word correction
355:5-- "applied more" should be "applied for" / word correction

20
21 Christophine Smith

22
Signature

9. 2. 21

Date

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

MICHAEL CLOUD, :
 :
 :
 Plaintiff, :
 : Civil Action No.:
 vs. :
 : 3:20-CV-01277-E
 THE BERT BELL/PETE ROZELLE :
 NFL PLAYER RETIREMENT PLAN, :
 :
 Defendant. :

DEPOSITION OF PATRICK C. REYNOLDS

DATE: August 4, 2021

TIME: 9:11 a.m. to 5:26 p.m.

LOCATION: Groom Law Group
1701 Pennsylvania Avenue
Suite 1200
Washington, D.C. 20006

REPORTED BY: Felicia A. Newland, CSR

Veritext Legal Solutions
1250 Eye Street, N.W., Suite 350
Washington, D.C. 20005

3 Q Do you review the decision letter
4 before it's sent out?
5 A Typically, no.

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Page 176

1

Page 175

Page 177

45 (Pages 174 - 177)

<p>11 Q How many disability claims have been 12 presented to you during your time on the committee? 13 A I don't have a specific number. 14 Q Give me an estimate. 15 A Roughly a thousand a year. 16 Q You said there are various statistics 17 that are presented at these board meetings. Do you 18 have the statistics on what percentage of claims 19 are granted? 20 A I don't. I have access to the 21 statistics. I believe they're on the Plan 22 director's report.</p> <p style="text-align: right;">Page 198</p>	<p>1 MR. DENNIE: Yeah, I don't have them, 2 but that's a certainly responsive document or 3 documents. 4 BY MR. DENNIE: 5 Q All right. So you believe that you 6 presided over approximately a thousand disability 7 applications a year during your tenure, correct? 8 A I think that's fair, yeah, 9 thereabouts. 10 Q Where we would find the percentage of 11 claims that were granted, would be in the Plan 12 director's report that's done quarterly. Is that 13 correct? 14 A I believe so. 15 Q And the same question as to the 16 claims that were denied. There would be a 17 percentage of claims denied showing the Plan 18 director's report that gets prepared quarterly. Is 19 that correct? 20 A I believe -- I believe so. That may 21 not be the case. It may just show the number of 22 claims.</p> <p style="text-align: right;">Page 200</p>
<p>1 Q Okay. So the Plan director's report? 2 A I believe so. I may be -- the number 3 of claims that come through and the number of 4 claims that are decided is on that. I believe it 5 includes percentage of approvals and denials, but I 6 might be mistaken. 7 Q How often does the Plan director 8 report come out? 9 A Quarterly, for the board meetings. 10 MR. DENNIE: Is that something that 11 you all can give us since -- I mean, I don't have 12 our request here, but that's certainly responsive 13 to probably more than one of our requests for 14 production. 15 MR. MEEHAN: I'll take it under 16 advisement and circle back to you. 17 MR. DENNIE: Let me know as soon as 18 you can. We're running out of time for discovery. 19 MR. MEEHAN: If you can direct us to 20 a particular request you've made, that would be 21 helpful. You can do that offline when you have an 22 opportunity.</p> <p style="text-align: right;">Page 199</p>	<p>22 I missed part of it.</p> <p style="text-align: right;">Page 201</p>

	<p>17 Q In Section 5.7(b) of Exhibit 1, is</p> <p>18 also where we see the changed circumstances</p> <p>19 language. Do you see that?</p> <p>20 A I do.</p> <p>21 Q Do you see where it is defined</p> <p>22 anywhere?</p> <p>Page 242</p> <p>Page 244</p>
	<p>1 A Yeah, again, it's not a capitalized</p> <p>2 term, so I would have to assume it's not defined.</p> <p>3 Q Now that you've had an opportunity to</p> <p>4 review this, does that refresh your memory on who</p> <p>5 defined the term "changed circumstances"?</p> <p>6 A I don't know who defined the term,</p> <p>7 but the practice that has been in place for the</p> <p>8 committee and for the board is that a changed</p> <p>9 circumstance is a new or different impairment.</p> <p>10 Q What do you mean by "impairment"?</p> <p>11 A A new injury, a new condition.</p> <p>Page 243</p> <p>Page 245</p>

1

3 Q I believe you testified earlier, but
4 I want to confirm, you did not write Exhibit 4,
5 correct?

6 A That's correct.

22 Q So we'll flip to CLOUD-AR-284 in

Page 332

1 Exhibit 4. And let me know when you're there.

2 A Yes, I'm here.

Page 331

Page 333

	<p>1 at this document?</p> <p>2 A I don't recall.</p> <p>3 Q Do you know anybody that provided</p> <p>4 advice to you as it pertains to Exhibit 3?</p> <p>5 A No.</p> <p>6 Q Do you know whether Elton Banks</p> <p>7 provided any advice to you?</p> <p>8 A No.</p> <p>9 Q So other than your conclusion that</p> <p>10 Mr. Cloud didn't meet the terms of shortly after,</p> <p>11 as defined in the Plan, you can't give us any more</p> <p>12 details on how you arrived at that conclusion. Is</p> <p>13 that correct?</p> <p>14 A Yeah, that's correct.</p> <p>15 Q All right. Go to 5, please.</p> <p>16 A Okay.</p> <p>17 (Reynolds Deposition Exhibit Number 5</p> <p>18 marked for identification.)</p> <p>19 BY MR. DENNIE:</p> <p>20 Q What is Exhibit 5?</p> <p>21 A It is a request for reclassification.</p> <p>22 It also contains a new application request dated</p> <p>Page 334 Page 336</p>
<p>19 Q Did you make a single change to this</p> <p>20 document?</p> <p>21 A Not that I recall.</p> <p>22 Q Do you know whether you even looked</p> <p>Page 335 Page 337</p>	<p>1 February 14th, 2016.</p> <p>2</p>

	<p>1 Q I don't disagree with you, but I</p> <p>2 don't know what they did or didn't do.</p> <p>3 A Yeah, I don't either.</p> <p>4 Q And the only way for me to figure</p> <p>5 that out is to talk to the people that made these</p> <p>6 decisions, correct?</p> <p>7 MR. MEEHAN: Objection. Asked and</p> <p>8 answered and legal conclusion. I believe that's</p> <p>9 the fourth time you've asked that.</p> <p>10 BY MR. DENNIE:</p> <p>11 Q We're talking about specific</p> <p>12 documents and what they reviewed.</p> <p>13 A I don't know how the -- how the board</p> <p>14 came to their decision.</p>
Page 362	Page 364
<p>12 If the committee decides against</p> <p>13 granting Mr. Cloud's reclassification request, does</p> <p>14 the board conduct its own independent review?</p> <p>15 A Yes, they do.</p> <p>16 Q Are you aware of anything they did?</p> <p>17 A I am not, no.</p> <p>18 Q Are you aware of whether they just</p> <p>19 rubber-stamped the decision of the committee and</p> <p>20 said denied and moved on?</p> <p>21 A I don't believe that they would</p> <p>22 fulfill their fiduciary duties if they did that.</p>	(
Page 363	Page 365

<p>Page 382</p>	<p>1 Q Were you in attendance for this 2 meeting? 3 A It appears that I was not. 4 Q I know you said you weren't in 5 attendance, so I just want to make sure we're on 6 the same page. And when you're saying you weren't 7 in attendance, you weren't in person, correct? 8 A Correct. 9 Q Did you appear by phone by chance? 10 A Not to my recollection. 11 Q So earlier when we were talking about 12 the board's decision of Mr. Cloud's 2016 13 reclassification decision, and you said you 14 believed you were there, these minutes reflect 15 apparently you were not, correct? 16 A That's correct. 17 Q So you have absolutely no idea what 18 happened at the November 15th, 16th, 2016 board 19 meeting, correct? 20 A Aside from what I read in these 21 meeting minutes and the counsel report, no, I don't 22 know what took place. No.</p> <p>Page 384</p>
<p>14 Q I just want to flip over to Exhibit 15 12, CLOUD_MIN_005. 16 A Okay. 17 Q Are you there? 18 A I am. 19 Q What do you understand this to be? 20 A These appear to be the meeting 21 minutes for the November 2016 Retirement Board 22 meeting.</p> <p>Page 383</p>	<p>1 Q So if I asked you what was said about 2 Mr. Cloud's case, you wouldn't have a clue, 3 correct? 4 A I do not know. 5 Q Is that correct? 6 A Yes, that's correct.</p> <p>Page 385</p>

1 Cloud, Michael v. The Bert Bell/Pete Rozelle NFL Player
2 Patrick Charles Reynolds (#4745148)

3 ACKNOWLEDGEMENT OF DEPONENT

4 I, Patrick Charles Reynolds, do hereby declare that I
5 have read the foregoing transcript, I have made any
6 corrections, additions, or changes I deemed necessary as
7 noted above to be appended hereto, and that the same is
8 a true, correct and complete transcript of the testimony
9 given by me.

10 
11 _____

9/3/2021

12 Patrick Charles Reynolds

Date

13 *If notary is required

14 SUBSCRIBED AND SWORN TO BEFORE ME THIS

15 _____ DAY OF _____, 20____.

16
17
18 _____
19 NOTARY PUBLIC
20
21
22
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24
25

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

MICHAEL CLOUD, :
 :
 :
 Plaintiff, :
 : Civil Action No.:
 vs. :
 : 3:20-CV-01277-E
 THE BERT BELL/PETE ROZELLE :
 NFL PLAYER RETIREMENT PLAN, :
 :
 Defendant. :

INDIVIDUAL AND 30(b)(6) DEPOSITION OF
HESSMAN VINCENT

REPORTED BY: Felicia A. Newland, CSR

5 Q Did she ever recall reviewing
6 Mr. Cloud's case?

7 A I don't recall if we asked her the
8 question in that manner, but she did decide on
9 Mr. Cloud case.

Page 26

16 If I wanted to know what was
17 discussed for Ms. Blackburn to come to her decision
18 to deny Mr. Cloud's request for benefits, I would
19 have to ask her that question because you didn't
20 ask her, right?

21 A I did not ask her, that's correct.

Page 28

7 Q Did you ever ask whether
8 Ms. Blackburn had any recollection as to any
9 discussion or debate as to Mr. Cloud's case?

10 A I don't recall if a question was
11 asked in that manner. But there was nothing unique
12 that popped out to her about the case.

Page 27

14 Q Did you ever ask Ms. Blackburn
15 whether she discussed Mr. Cloud's case with Patrick
16 Reynolds and Chris Smith?

17 A I did not ask that.

18 Q Did you ever ask Ms. Blackburn what
19 advice she received from third parties about
20 Mr. Cloud's case?

21 A I did not ask that question.

Page 29

8 (Pages 26 - 29)

5 Q So was there something that was asked
6 about his review and any independent research that
7 he conducted?

8 A No. It was nothing along those
9 lines.

10 Q Okay. Did you ask Mr. Cass whether
11 he received any advice from a third-party adviser
12 as it pertains to Mr. Cloud's case?

13 A I did not ask that question.

Page 30

Page 32

9 Q Did you ask Mr. Cass if he recalled
10 any discussions he had with any fellow board
11 members been Mr. Cloud's case?

12 A I did not ask that question.

Page 31

Page 33

9 (Pages 30 - 33)

<p>1</p> <p>6 Q And there was no discussion that --</p> <p>7 let me ask it a different way.</p> <p>8 You did not ask Mr. Cass whether he</p> <p>9 had any discussions about Mr. Cloud's case with any</p> <p>10 of the other board members. Is that correct?</p> <p>11 A I did not ask that question.</p> <p>--</p> <p>Page 34</p>	<p>11 Q Did you actually ask him what</p> <p>12 conversations he had with other members of the</p> <p>13 board about his decision on Mr. Cloud's claim?</p> <p>14 A I did not.</p> <p>15 Q Did you ask him whether he spoke to</p> <p>16 Mr. Reynolds or Ms. Smith in his review of</p> <p>17 Mr. Cloud's case?</p> <p>18 A I did not.</p> <p>?</p> <p>Page 36</p>
<p>5 Q What was Mr. Philip's response to</p> <p>6 those questions?</p> <p>7 A The same as the previous two; no</p> <p>8 unique knowledge, no notes kept, didn't review</p> <p>9 outside the meeting's website.</p> <p>10 Q Did Mr. Philips recall actually</p> <p>11 reviewing any of Mr. Cloud's records?</p> <p>12 A He doesn't recall the case.</p> <p>Page 35</p>	<p>6 Q Did you ask whether they ever kept</p> <p>7 any notes?</p> <p>8 A Not specifically in that manner, no.</p> <p>9 We asked them if they had any notes, and they do no</p> <p>10 have any notes.</p> <p>Page 37</p>

<p>6 Q So if a board member was to keep</p> <p>7 notes of their analysis of medical records and</p> <p>8 information presented in a disability application,</p> <p>9 they would keep those personally and independently</p> <p>10 of the benefits office. Is that correct?</p> <p>11 A That may be the case if they are</p> <p>12 keeping notes.</p> <p>Page 38</p>	<p>3 Q Did Mr. McCullum have any</p> <p>4 recollection of medical records presented by</p> <p>5 Mr. Cloud?</p> <p>6 A I didn't ask that question</p> <p>7 specifically.</p> <p>8 Q Did Mr. McCullum recall or have any</p> <p>9 recollection of the injuries, illnesses, ailments,</p> <p>10 that Mr. Cloud was presenting?</p> <p>11 A I didn't ask that question.</p> <p>12 Q Did Mr. McCullum recall ever having</p> <p>13 any conversations with Mr. Reynolds or Ms. Smith</p> <p>14 about Mr. Cloud's appeal?</p> <p>15 A That question was not asked.</p> <p>16 Q Did Mr. McCullum have any</p> <p>17 recollection of any discussion, conversations or</p> <p>18 debates between him and other members of the board</p> <p>19 relating to Mr. Cloud's request for benefits?</p> <p>20 A That question was not asked.</p> <p>Page 40</p>
<p>Page 39</p>	<p>Page 41</p>

8 Q Is it fair to say all of the
9 questions that were asked of the board members were
10 yes-or-no questions?
11 A Yes.

Page 78

22

Page 80

Page 79

Page 81

21 (Pages 78 - 81)

<p>1</p> <p>7 Q Let's go one by one.</p> <p>8 As it pertains to requests to receive</p> <p>9 Active A football benefits, do you know the numbers</p> <p>10 that was granted versus the ones that were denied?</p> <p>11 A I do not know the numbers denied.</p> <p>12 And I can tell you based off of March 2021, how</p> <p>13 many players are receiving Active football.</p>	

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Page 120

Page 119

Page 121

31 (Pages 118 - 121)

<p>14 Q Thirty-two players are receiving how 15 many requests for Active A benefits have been 16 denied? 17 A I don't know have that answer. 18 Football --</p> <p style="text-align: right;">Page 122</p>	<p>20 Q Are there any spreadsheets or other 21 data that you all keep on total and permanent 22 disability claims that have been granted or denied?</p> <p style="text-align: right;">Page 124</p>
<p style="text-align: right;">Page 123</p>	<p>1 A Historically, there is a database 2 that keeps track of a case as it goes through. And 3 then once a decision is made, approval or denial, 4 that's acknowledged, it would have to be a -- it's 5 considered a data dump onto a chart and then it has 6 to be configured to provide that type information. 7 A database has not existed for forever -- 8 Q So there is a data -- I'm sorry. Go 9 ahead. 10 A I mean if you're looking for from the 11 inception of T&P, I wouldn't say that that sort of 12 database exists. The database is relatively newer 13 in the sense that since it's after 2000 -- I 14 wouldn't even be able to say the exact year, but 15 it's after 2010, well after 2010. 16 Q Okay. So sometime after 2010, a 17 database was created that would show the number of 18 claims that are granted and the number of claims 19 that are denied for total and permanent benefits, 20 correct? 21 A Yes, if you download the data, that 22 should be retrievable.</p> <p style="text-align: right;">Page 125</p>

<p>1 Q And that's a document that can be 2 easily produced in a lawsuit, correct? 3 MR. MEEHAN: Well, Objection to form. 4 Can you explain that again, 5 Mr. Vincent. 6 THE WITNESS: Yes. 7 So I wouldn't be able to do it 8 right now. For example, we would have to go 9 into the database, look at the fields to 10 determine, you know, what the request is. And 11 then from there, it would go into a massive Excel 12 sheet and then it would have to be filtered, for 13 example, approvals and denials. But that would 14 be a method to kind of get it at the end, to have 15 an overall scope. 16 BY MR. DENNIE: 17 Q But you could run a query in your 18 database and retrieve the requested information, 19 correct? 20 MR. MEEHAN: Objection to the form. 21 THE WITNESS: We should be able to 22 run a query to get that type of information.</p> <p style="text-align: right;">Page 126</p>	<p>1 and capricious. And I don't know why we're still 2 fighting that. It's the same request that we 3 talked about with the director's report and the 4 counsel report. The reason we don't know about 5 this stuff is because you're not giving us 6 information that's being requested. 7 So you have the data, so you've got 8 to give the data. I mean, here we are in 9 discovery depositions two weeks before the 10 discovery deadline expires and I'm learning about 11 records for the first time. I just ask you to 12 meet your duty under the rule. 13 We'll have to add that to our 14 motion to compel. This is our conferring 37, 57, 15 and 58 of the request. If you have responsive 16 information, you need to produce it. You can get 17 back to me about when it's going to be produced. 18 We've requested the director's and counsel report 19 prior to this deposition. It was not provided, 20 so we're apparently going to have to demand and 21 request more stuff. But you can get back to me. 22 MR. MEEHAN: Okay. Since you want to</p> <p style="text-align: right;">Page 128</p>
<p>1 MR. DENNIE: Counsel, was that 2 something that you guys can produce? That's the 3 first time that we heard that, too. 4 MR. MEEHAN: Well, as you know, we 5 think that has nothing whatsoever to do this 6 lawsuit, so you can send a request for it and we 7 will take it under advisement and we'll try to meet 8 and confer with you but as I understand -- 9 MR. DENNIE: We already have. 10 MR. MEEHAN: It's no -- there's been 11 no meeting and conferring on that topic. As you 12 just said, that came up a moment ago. That's brand 13 new. We've had no discussion on it at all. But as 14 I understand the witness, he is talking about it is 15 a process that he could follow to create something. 16 And that sounds like a lot of work to me. So I 17 will have to get a better understanding from the 18 witness. And I would like to have that 19 understanding from you off this record as to what 20 the relevance to this case it could possibly have. 21 So that's a discussion that we would need to have. 22 MR. DENNIE: As you know, arbitrary</p> <p style="text-align: right;">Page 127</p>	<p>1 put it on the record, I'll just say briefly what 2 took place just now is not a meet and confer. I do 3 not know whether production of that information is 4 something that will take five minutes or five 5 years. I have no insight on it. Now is not the 6 time for me to have that discussion with 7 Mr. Vincent. 8 The director's and counsel reports, 9 we had no meet and confer of any nature. You 10 made your request, we've communicated that we 11 would get back to you. You filed a motion with 12 no meet and confer on that topic. I don't want 13 to belabor this deposition. We're not going to 14 agree right now. 15 MR. DENNIE: What are you talking 16 about? 17 MR. MEEHAN: I do not wish to belabor 18 this -- 19 MR. DENNIE: We talked about it on 20 the 5th. 21 MR. MEEHAN: -- deposition -- we did 22 not.</p> <p style="text-align: right;">Page 129</p>

14 Q And as we sit here today, you can't
15 tell me how many claims that were Active A benefits
16 have been denied. Is that correct?

17 A That's correct, I cannot give you the
18 decisions on Active -- well, let's just say total
19 and permanent disability as a whole, since the
20 category is determined by the committee or the
21 board.

Page 138

18 Q Can you tell me how many claims for
19 Inactive A benefits have been denied?

20 A I do not have that answer, no.

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Page 139

Page 141

36 (Pages 138 - 141)

<p>4 Q Do you know whether more benefits 5 applications under the T&P umbrella are granted or 6 denied? 7 A I wouldn't be able to confirm that 8 right now.</p> <p>21 Q The only way for us to get those is 22 going to be through that database that you talked</p> <p style="text-align: right;">Page 158</p>	<p>1 reclassifications appeals have been granted? 2 A I do not know that answer. 3 Q Who are the beneficiaries under the 4 Plan? 5 A Who are the beneficiaries? The 6 players.</p> <p style="text-align: right;">, Page 160</p>
<p>1 about before, correct? 2 MR. MEEHAN: Objection. No 3 foundation. 4 THE WITNESS: That would be 5 information in that database.</p> <p>13 As we sit here today, you can't tell 14 me whether T&P benefits applications are granted or 15 denied two to one, three to one, four to one, five 16 to one? You have no clue. Is that right? 17 A That's correct. 18 Q Do you know how many of the T&P 19 reclassifications benefits appeals have been 20 granted? 21 A I cannot confirm that either. 22 Q Do you know a percentage of the T&P</p> <p style="text-align: right;">Page 159</p>	<p style="text-align: right;">Page 161</p>

<p>7 Q Of the Active football benefits that</p> <p>8 have been provided, how many of those are related</p> <p>9 to concussion symptoms or syndrome?</p> <p>10 A I don't have an answer to that at</p> <p>11 all.</p> <p>--</p> <p>22 during the quarterly board meeting, there's</p> <p style="text-align: right;">Page 170</p>	<p>1 have been?</p> <p>2 A Maybe with the director of plan book.</p> <p>3 It goes over the amounts, it may have been the</p> <p>4 retirement board discussion. I couldn't confirm</p> <p>5 where that discussion, what happens. But that's --</p> <p>6 Q So let me -- I didn't really hear the</p> <p>7 first part. You said something about a director's</p> <p>8 plan or something to that effect. What is that?</p> <p>9 A Well, when the director of the Plan</p> <p>10 Benefit Office reports on the allocation of money</p> <p>11 that goes out on disability, it is acknowledged who</p> <p>12 is receiving the benefit -- I'm sorry, the number</p> <p>13 of players receiving a certain benefit and which</p> <p>14 ones.</p> <p>15 Q Okay. And for some reason I'm having</p> <p>16 a little more trouble hearing you right now, so, I</p> <p>17 mean, if you could speak up a little bit.</p> <p>18 A Yeah.</p> <p>19 Q And let me tell you what I heard and</p> <p>20 tell me if I'm wrong. Did you say that that's</p> <p>21 something that the director of the Plan stands up</p> <p>22 and says or is that a document that's presented?</p> <p style="text-align: right;">Page 172</p>
<p>1 acknowledgment of how many players are receiving a</p> <p>2 benefit and which ones at that time.</p> <p>3 Q Would that be in the minutes?</p> <p>4 A Would it be in the minutes? I can't</p> <p>5 confirm that. I believe it would be but...</p> <p>6 Q Okay. If you'll flip to Exhibit 12.</p> <p>7 A Okay.</p> <p>8 Q Do you see that indicated anywhere?</p> <p>9 MR. MEEHAN: Hang on one second. He</p> <p>10 needs to get the exhibit binder.</p> <p>11 MR. DENNIE: Okay.</p> <p>12 MR. MEEHAN: It's just a little</p> <p>13 further down the table.</p> <p>14 THE WITNESS: Thank you.</p> <p>15 MR. MEEHAN: Okay. He's got it.</p> <p>16 THE WITNESS: No, that is not in the</p> <p>17 minutes provided to you -- or by you, I should say.</p> <p>18 BY MR. DENNIE:</p> <p>19 Q Those were provided to me, not by me,</p> <p>20 just so we're clear.</p> <p>21 A Okay.</p> <p>22 Q So where in the minutes should that</p> <p style="text-align: right;">Page 171</p>	<p>1 That's why where I didn't hear you.</p> <p>2 A Both. There is a document that has</p> <p>3 the amounts, the number of players, and it's also</p> <p>4 expressed during the meeting itself.</p> <p>5 Q Is that the director's report?</p> <p>6 A Yes. Sorry if I called it director's</p> <p>7 plan.</p> <p>8 Q So the director's -- I'm sorry. I</p> <p>9 cut you off. Can you say that again?</p> <p>10 A Yeah. I called it the director plan</p> <p>11 book. It would be the director's report.</p> <p>12 Q Okay. So when you say director's</p> <p>13 plan book and director's report, those are the same</p> <p>14 thing, correct?</p> <p>15 A Yes, plan director's report.</p> <p>16 Q If I heard you correctly, those are</p> <p>17 prepared quarterly for the board meeting. Is that</p> <p>18 right?</p> <p>19 A That's correct.</p> <p style="text-align: right;">Page 173</p>

1	<p data-bbox="769 974 850 999">Page 226</p> <p data-bbox="1386 974 1468 999">Page 228</p> <p data-bbox="769 1871 850 1896">Page 227</p> <p data-bbox="1386 1871 1468 1896">Page 229</p> <p data-bbox="867 1575 1435 1871">15 Q You would agree that the Plan office 16 directed Mr. Cloud to see Dr. Mandelbaum, correct? 17 A For his line of duty examination, 18 yes, sir. 19 Q So if your counsel e-mailed me and 20 said that Mr. Cloud was directed to Dr. Mandelbaum 21 by someone other than the Plan, that would be 22 incorrect, right?</p>

58 (Pages 226 - 229)

	<p>11 Q Okay. So what I just heard you say,</p> <p>12 you didn't come up with the definition of changed</p> <p>13 circumstances, correct?</p> <p>14 A That's correct, sir.</p> <p>15 Q You said the parties did, correct?</p> <p>16 A Yes, they interpret the Plan rules.</p> <p>17 Q Who from the parties sat down and</p> <p>18 came up with the definition of changed</p> <p>19 circumstances?</p> <p>20 A I'm not sure, sir.</p> <p>Page 334</p> <p>Page 336</p>
<p>7 BY MR. DENNIE:</p> <p>8 Q My question was not what you</p> <p>9 interpret the Plan to be saying. My question is:</p> <p>10 Is changed circumstance, as referenced in 5.7(b),</p> <p>11 defined anywhere in The Plan?</p> <p>12 A I do not see that in The Plan,</p> <p>Page 335</p>	<p>Page 337</p>

22

Page 338

Page 340

5 Q Would you agree that it's important
6 that the committee and board provide the same
7 definition of clear and convincing in all cases?

8 A Yes, it needs to be clear and
9 convincing.

10 Q Would you agree that it's important
11 that the committee and the board provide the same
12 definition of changed circumstance in all cases?

13 A Between the committee and the board,
14 they should agree.

15 Q So is that yes?

16 A Yes, sir.

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Page 341

86 (Pages 338 - 341)

1	<p>13 BY MR. DENNIE:</p> <p>14 Q You're not aware of that circumstance</p> <p>15 because the letters are never submitted to the</p> <p>16 committee prior to being sent to the player,</p> <p>17 correct?</p> <p>18 A Correct, sir.</p>

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93 (Pages 366 - 369)

APPENDIX 5

E-Ballot 02/22/2016

DICC Page 1

Michael A. Cloud's T&P Disability ACTIVE FOOTBALL Application 7-15-16**RECEIVED****Michael A. Cloud****120 Mont Blanc Drive FEB 17 2016****Heath, TX 75032****NFL PLAYER BENEFITS****(p) 214-364-0098****macsportsandrehab@gmail.com****NFL Player Disability & Neurocognitive Benefit Plan****200 Saint Paul St.****Suite 2420****Baltimore, MD 21202****RE: Total & Permanent Disability ACTIVE FOOTBALL Benefits****TO: NFL Retirement and Benefits Board****CC: Sarah E. Gaunt, Plan Director****Paul Scott, Benefits Coordinator**

Dear NFL Players Benefits Committee,
 Enclosed please find Michael Cloud's complete application for Total & Permanent Active Football Disability Benefits.

Mr. Cloud has been awarded a Fully Favorable Decision of SSDI Benefits from **Administrative Law Judge, Daniel Curran**, as a result of severe impairments of mental disorder stemming from multiple NFL football concussions. In Judge Curran's report he notes, as a result of these concussions, Mr. Cloud has been "unable to sustain gainful activities due to the following severe mental disorders of migraine headaches and affective disorders, limiting his ability to understand, remember, and carry out simple or detailed instruction; the ability to interact with the general public; and is unable to maintain attention and concentration for extended periods of time."

In **Dr. John Patrick Cronin, Ph. D., M.P.H.** 2004 Specific Head Trauma Evaluation of Mr. Cloud he notes that after he sustained a significant helmet to helmet concussion on October 31, 2004 while with the New York Giants; "significant physical and cognitive problems occurred immediately after this collision and Mr. Cloud experienced confusion, disorientation and dizziness as a result of the impact. He was able to walk from the field with assistance (but does not recall doing so) and remained sidelined for the remainder of the game. Mr. Cloud does not recall how he returned to his home in New York, nor does he recall his level of performance for the remaining games for that season. Mr Cloud's attempted to regain his playing status the following spring, but was unable to complete basic plays and assignments and subsequently was cut by two teams..."

During the Spring '05 Mr. Cloud signed a two year contract with the NY Giants worth over \$2.6-million, but was cut due to his inability to remember the most basic plays and football assignments. Months into the 2005 season Mr. Cloud was again acquired by the NE Patriots

Texas DRIVER LICENSE

DL 10/08/2015 10/08/2015 10/08/2015
 DOB 07/01/1975
 CLOUD
 MICHAEL ALEXANDER
 120 MONT BLANC DRIVE
 HEATH TX 75032
 Restrictions NONE
 Hgt 5-11 Sex M Eyes BRO
 DD 49619581005058915836

MEDICARE HEALTH INSURANCE

1-800-MEDICARE (1-800-633-4227)

NAME OF BENEFICIARY

MICHAEL A CLOUD

MEDICARE ID NUMBER

SEX

MALE

IS ENTITLED TO

HOSPITAL (PART A)

EFFECTIVE DATE

MEDICAL (PART B)**03-01-2013****07-01-2014**

SIGN

DATE

E-Ballot 02/22/2016

DICC Page 2

Michael A. Cloud's T&P Disability ACTIVE FOOTBALL Application 7-15-16

and then again by the NY Giants, but was consequently cut due to these cumulative mental disorders.

Mr Cloud's SSDI award letter and a copy of his SS and medical file are enclosed for the Committee's review. May this information help guide the NFL Players Benefits Committee in determining Mr Cloud's Active Football Disability Benefits status as well as further assisting in his medical care.

Should you have any questions, please feel free to contact me. Thank you.

Be well,

Jennifer L. Cloud, Esq.
Michael A. Cloud

MEDICAL RECORDS INDEX

1. **Michael Cloud's** Total and Permanent Disability ACTIVE FOOTBALL Benefits Application
2. **Social Security Administration Benefit Verification Letter**
3. **Daniel Curran, Administrative Law Judge** – SSDA, Notice of FULL FAVORABLE SSDI and SSI Decision
4. **Dr. Harry Cates, LPC.,** - The Life Works Group; Medical Review & Mental Residual Functional Capacity Assessment
5. **Dr. Anne Smith, Ph.D.** - Behavioral Health; Medical Review
6. **Dr. John Patrick Cronin, Ph. D., M.P.H.** – Primary Behavioral Health Clinics, Inc.; Medical Review and 2004 Specific Head Trauma Evaluation
7. **Dr. Jeffery Berman, M.D.** – Orthopaedic; Medical Review
8. **Dr. Michael J. Einbund, M.D.** – Orthopaedic Surgery; Medical Review
9. **Dr. George H. Canizares, M.D.** - All Florida Orthopaedic Associates w/NFL LOD Medical Report
10. **Dr. Adam S. DiDio, M.D.** – Suncoast Medical Center Neurology w/NFL LOD Medical Report
11. **NFL Medical Summary**
12. **Dr. Russell Warren, M.D. w/Dr. Michael Pollack, M.D. & Dr. Ann M. Moore, M.D.** - New York Football Giants Cumulative Medical Journal.
13. **Dr. Bertram Zarins, M.D.** - New England Patriots Medical Summary

APPENDIX 6



NFL PLAYER BENEFITS

PENSION PLAN

200 St. Paul Street, Suite 2420
Baltimore, Maryland 21202
Phone 800.638.3186
Fax 410.783.0041

November 23, 2016

Mr. Michael Cloud
120 Mont Blanc Drive
Heath, Texas 75032

Re: Bert Bell/Pete Rozelle NFL Player Retirement Plan—Final Decision on Review

Dear Mr. Cloud:

At its November 16, 2016 meeting the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan") considered your appeal from the Disability Initial Claims Committee's ("Committee") decision denying your request for reclassification of your total and permanent disability ("T&P") benefits to the Active Football category. We regret to inform you that the Retirement Board denied your appeal for the reasons described below.

Discussion

The Plan received your original application for T&P benefits on July 1, 2014. As you know, the Committee found you to be totally and permanently disabled by virtue of your Social Security Administration ("SSA") disability award, and it awarded you Inactive A T&P benefits, effective May 1, 2014. The basis for the Committee's decision was explained to you in a letter dated July 23, 2014. You did not appeal that decision.

By letter received February 17, 2016, your representative, Jennifer Cloud, requested that your Inactive A benefits be reclassified to the Active Football category. She stated that you "became disabled in 2005, while playing for the New York Giants due to cumulative mental disorder," and she submitted a copy of your SSA file and other records.

The Committee denied your request for reclassification by letter dated March 2, 2016.

By letter received September 2, 2016, Ms. Cloud appealed the Committee's decision to the Retirement Board. With the appeal, she stated that your SSA award resulted from a severe mental disorder stemming from multiple concussions, and she argued that your disability arose shortly after your October 2004 head trauma. Ms. Cloud submitted additional medical records with her appeal, such as a report from psychologist Dr. John Cronin dated February 2, 2012.

Mr. Michael Cloud
November 23, 2016
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At its November 16, 2016 meeting, the Retirement Board reviewed your request for reclassification and determined that it must be denied. Section 5.7(b) governs requests for reclassification such as yours. It permits reclassification only where a Player "shows by evidence found by the Retirement Board... to be clear and convincing that, because of changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of T&P benefits." The Retirement Board interprets Section 5.7(b)'s "changed circumstances" requirement to mean a new or different impairment from the one that originally qualified you for T&P benefits. Because you seek reclassification to Active Football, you would have to clearly and convincingly show that (1) you have a new or different impairment (Section 5.7(b)), (2) that new or different impairment arose while you were an Active Player (Section 5.3(a)), and (3) it caused you to be totally and permanently disabled "shortly after" it first (Section 5.3(a)). Under Section 5.3(e) of the Plan, you satisfy the "shortly after" requirement if you became totally and permanently disabled within six months of when your disabling condition or impairment first arose. Conversely, you do not meet the "shortly after" requirement if you became totally and permanently disabled more than twelve months after the condition or impairment arose. The Retirement Board has "the right and duty to determine whether the 'shortly after' standard is satisfied" for any claim of total and permanent disability falling within this six to twelve month period.

The Retirement Board reviewed your 2014 application for T&P benefits and noted that it was based on a combination of orthopedic, neurological, and cognitive impairments, such as post-concussion syndrome, clinical depression, dementia pugilistica, migraine, vertigo, impaired verbal fluency, acute compartment syndrome, plantar fasciitis, cluneal nerve injury, and multiple orthopedic impairments. The Retirement Board also noted that your request for reclassification is based on what you call "severe" mental impairments, but those are the same impairments listed in your 2014 application, and they formed the basis of your award of Inactive A T&P benefits (and your SSA award). Thus, the Retirement Board determined that you have not met Section 5.7(b)'s reclassification requirements because you have not clearly and convincingly shown that you are totally and permanently disabled by a new or different impairment. The Retirement Board also determined that, even if your request for reclassification were based on a new or different impairment, the medical evidence you submitted does not show that you meet the requirements for the Active Football category. The evidence you submitted does not show that you are totally and permanently disabled, and it all falls well outside any conceivable "shortly after" period required for Active Football benefits. The Retirement Board noted that, for the Active Football category, it is not enough that your disability first arise during your NFL career; it must also become totally and permanently disabling "shortly after" it first arises.

Mr. Michael Cloud
November 23, 2016
Page 3

In any event, the Retirement Board also determined that your appeal was untimely under Section 12.6(a). The Retirement Board noted that (1) according to Plan records, you received the decision letter on March 4, 2016; (2) that decision letter advised you of the 180-day appeal deadline (which expired on August 31, 2016); and (3) the Plan did not receive your appeal until September 2, 2016, two days after the 180-day deadline expired.

For these reasons, the Retirement Board concluded that it cannot honor your request to reclassify your existing Inactive benefits to the Active Football category. For this reason, the Retirement Board denied your appeal.

Appeal Rights

You should regard this letter as a final decision on review within the meaning of Section 503 of the Employee Retirement Income Security Act of 1974, as amended, and the regulations issued thereunder by the Department of Labor. You are entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to your claim for benefits. You have the right to bring an action under Section 502(a) of the Employee Retirement Income Security Act of 1974, as amended, within 42 months from the date of this letter, which is May 16, 2020.

Please call the NFL Player Benefits Office if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Michael B. Miller". The signature is written in a cursive style with a large, stylized "M" and "B".

Michael B. Miller
Plan Director

Enclosure

cc: Jennifer Cloud

Relevant Plan Provisions

Section 5.1 provides that a Player is eligible for T&P benefits if he "is determined by the Retirement Board or the Disability Initial Claims Committee to be totally and permanently disabled in accordance with Section 5.2."

Section 5.2(a) provides the "General Standard" for determining whether a Player is totally and permanently disabled. It states:

An eligible Player who is not receiving monthly retirement benefits under Article 4 or Article 4A will be deemed to be totally and permanently disabled if the Retirement Board or the Disability Initial Claims Committee finds (1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country, and (2) that such condition is permanent. The educational level and prior training of a Player will not be considered in determining whether such Player is "unable to engage in any occupation or employment for remuneration or profit." A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within the meaning of this Section 5.2 merely because such person is employed by the League or an Employer, manages personal or family investments, is employed by or associated with a charitable organization, is employed out of benevolence, or receives up to \$30,000 per year in earned income. A disability will be deemed to be "permanent" if it has persisted or is expected to persist for at least twelve months from the date of its occurrence, excluding any reasonably possible recovery period.

Section 5.3 provides that T&P benefits will be awarded in one of four categories:

- (a) Active Football. Subject to the special rules of Section 5.4, Players will qualify for benefits in this category if the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled "shortly after" the disability(ies) first arises.
- (b) Active Nonfootball. Subject to the special rules of Section 5.4, a Player will qualify for benefits in this category if the disability(ies) does not result from League football activities, but does arise while the Player is an Active Player and does cause the Player to be totally and permanently disabled "shortly after" the disability(ies) first arises.
- (c) Inactive A. Subject to the special rules of Section 5.4, a Player will qualify for benefits in this category if a written application for T&P benefits or similar letter that began the administrative process that resulted in the award of T&P

benefits was received within fifteen (15) years after the end of the Player's last Credited Season. This category does not require that the disability arise out of League football activities.

- (d) Inactive B. All Players who are determined to be totally and permanently disabled in accordance with Section 5.2 but who do not qualify for categories (a), (b), or (c) above will be awarded benefits in this category. This category does not require that the disability arise out of League football activities.
- (e) "Shortly After" Defined. A Player who becomes totally and permanently disabled no later than six months after a disability(ies) first arises will be conclusively deemed to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above, and a Player who becomes totally and permanently disabled more than twelve months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above. In cases falling within this six- to twelve-month period, the Retirement Board or the Disability Initial Claims Committee will have the right and duty to determine whether the "shortly after" standard is satisfied.

Section 5.7(b) discusses Reclassification. "A Player who is awarded T&P benefits will be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement Board or the Disability Initial Claims Committee to be clear and convincing that, because of changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of T&P benefits. A Player's T&P benefit will not be reclassified or otherwise increased with respect to any month or other period of time that precedes by more than forty-two months the date the Retirement Board receives a written application or similar letter requesting such reclassification or increase that begins the administrative process that results in the award of the benefit. This forty-two month limitation period will be tolled for any period of time during which such Player is found by the Retirement Board or the Disability Initial Claims Committee to be physically or mentally incapacitated in a manner that substantially interferes with the filing of such claim.

Section 12.6(a) of the Plan sets forth the Plan's claims procedures. It provides, in pertinent part, that a Player "will have 180 days from the receipt of an adverse determination to file a written request for review of the initial decision to the Retirement Board."

Section 13.3 of the Plan states as follows:

Receipt of Documents. Correspondence, applications, forms, elections, designations, and other documents of any type are deemed received by the Disability Board only if and when actually received by the Disability Board, and not when mailed or otherwise sent or transmitted to the Disability Board. The common law "mailbox rule" is expressly rejected."